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PRINCIPLES OF CONTRACT

1

AGREEMENT, PROPOSAL, AND ACCEPTANCE

THE law of Contract may be described as the endeavour of public authority, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith¹ which has grown up in the mutual dealings of men of average rightmindedness. Accordingly the most popular description of a contract that can be given is also the most exact one, namely that it is a promise or set of promises which the law will enforce.² The specific mark of contract is the creation of a right, not to a thing, but to another man's conduct in the future. He who has given the promise is bound to him who accepts it, not merely because he had or expressed a certain intention, but because he so expressed himself as to entitle the other party to rely on his acting in a certain way. This is apt to be obscured in common cases, but is easily seen to be true. Suppose that A. agrees to sell to B. a thing of which not he but C. is the true owner. C. gives the thing to B. Here, though B has got the thing he wanted, and on better terms than he expected, A. has not kept his promise; and, if the other requisites of a lawful contract were present as between himself and B., he has broken his contract. The primary questions, then, of the law of contract are first, what is a promise? and next, what promises are enforceable?

The importance and difficulty of the first of these questions depend on the fact that men can justly rely on one another's intentions, and courts of justice hold them bound to their fulfilment, only when they have expressed in a manner that would convey to an indifferent person, reasonable and reasonably competent in the

¹ The modern tendency to look to "the realization of reasonable expectations" as the ground of just claims rather than an artificial equation of wills or intentions is well declared by Prof. Roscoe Pound, *Considerations in Equity*, *Wigmore Celebration Essays*, 1919, at 459; cp. Williston, *Mutual Assent in the Formation of Contracts*, *ib.* 525, with whom also I mainly agree. The learned reader who has both taste and leisure for examining a novel mode of approach may make what he can of Mr. George K. Gardner's *Inquiry into the Principles of the Law of Contracts*, 46 *Harv. Law Rev.* 1 (Nov. 1932). [See also Morris R. Cohen's *Basis of Contract*, 46 *Harv. Law Rev.* 553 (Feb. 1933). Another instructive American analysis is Morawetz, *Elements of the Law of Contracts* (2nd ed. 1927), ch. I. The theory of O. W. Holmes, that a contract is properly to be regarded as the taking of a risk creating a liability to pay damages in a certain event, was contested by Pollock (*post*, 142, n. 61) who is reinforced by Prof. W. W. Buckland in 8 *Cambridge Law Journal* (1944), 247-251.]

² [The American Restatement of Contracts, § 1, has substantially the same definition.]

matter in hand, the sense in which the expression is relied on by the party claiming satisfaction. Judges and juries stand in the place of this supposed indifferent person, and have to be convinced that the dealings in the particular case contained or amounted to the promise alleged to have been made and relied upon.

Our first business must therefore be to separate and analyse the elements which, generally speaking, must concur in the formation of a contract. A series of statements in the form of definitions, though necessarily imperfect, may help to clear the way.

AGREEMENT AND PROMISE.

1. Every agreement and promise enforceable by law is a contract.
2. An agreement is an act in the law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them.¹

3. Such declaration may take place by

- (a) the concurrence of the parties in a spoken or written form of words as expressing their common intention, or
- (b) an offer made by some or one of them, and accepted by the others or other of them

4. The declaration of any party to an agreement, so far as relates to anything to be done or forborne on his part, is called a promise. The expression of a person's willingness to become, according to the terms expressed, a party to an agreement, is called an offer or proposal.

An offer may become a promise by acceptance, but is not a promise unless and until it is accepted.²

5. An agreement which has no legal effect is said to be void. An agreement which ceases to have legal effect is said to become void or to be discharged.

6. An agreement is said to be a voidable contract if it is enforceable by law at the option of the other or others.

We proceed to develop and explain these statements, so far as appears convenient at the outset of the work.

1. DEFINITION OF AGREEMENT

The first and most essential element of an agreement is the consent of the parties. But in order that their consent may make an agreement of which the law can take notice, other conditions

¹ This statement was adopted by Kekewich J. *Forster v. Wheeler* (1887) 36 Ch. D. 695, 698; 57 L. J. Ch. 149. [Dr. R. M. Jackson, in 53 *Law Quarterly Review* (1937), 325, has pointed out some awkward consequences that ensue if it be insisted that agreement is essential to a contract. Cf. Williston, *Law of Contracts* (ed. 1936), § 9; Salmond & Winfield, *Contracts*, 3 seq.]

² This does not imply that every offer is revocable until acceptance. How far that is so is a question not of definition but of substantive law. "Offer" and "proposal" are synonymous terms: "proposal" is often convenient as allowing "proposer" to be used as a correlative term rather than the legitimate but clumsy "offeror."

must be fulfilled. The agreement must be, in our old English phrase, an act in the law: that is, it must on the face of the matter be capable of having legal effects. It must be concerned with duties and rights which can be dealt with by a court of justice. And it must be the intention of the parties that the matter in hand shall, if necessary, be so dealt with, or at least they must not have the contrary intention. An appointment between two friends to go out for a walk or to read a book together is not an agreement in the legal sense: for it is not meant to produce, nor does it produce, any new legal duty or right, or any change in existing ones.¹ Even the most formal expression of agreement cannot operate as a contract if the parties, in the same instrument, explicitly declare that they do not intend it to have any such operation, and that the agreement is to be binding only in honour.²

Again, there must not only be an act in the law, but an act which determines duties and rights of the parties. A consent or declaration of several persons is not an agreement if it affects only other people's rights, or even if it affects rights or duties of the persons whose consent is expressed without creating any obligation between them. The verdict of a jury or the judgment of a full Court is a concurrent declaration of several persons affecting legal rights; but it is not an agreement, since the rights affected are not those of the judges or jurymen. If a fund is held by the trustees of a will to be paid over to the testator's daughter on her marriage with their consent, and they give their consent to her marrying J. S., this declaration of consent affects the duties of the trustees themselves, for it is one of the elements determining their duty to pay over the fund. Still it is not an agreement, for it concerns no duty to be performed by any one of the trustees towards any other of them.

Nothing but the absence of intention seems to prevent a contract from arising in many cases of this kind. A. asks B. to dinner. Here is proposal of something to be done by B. at A.'s request, namely, coming to A.'s house at the appointed time. If B. accepts, there is in form a contract by mutual promises. If acceptance is not required, the trouble and expense of coming to A.'s house are ample consideration for A.'s promise to provide a dinner. Why is A. not legally bound to have meat and drink ready for B., so that if A. had forgotten his invitation and gone elsewhere B. should have a right of action? Only because no legal bond was intended by the parties. It might possibly be said that these are really cases of contract, and that only social usage and the trifling amount of pecuniary interest involved keep them out of courts of justice. But I think Savigny's view, which is here adopted, is the better one. There is not a contract which it would be ridiculous to enforce, but the original proposal is not the proposal of a contract. One or two modern writers think it enough to say *De minimis non curat lex*. But purely honorary engagements are often of great importance. [Cf. 170 *Law Times* (1930), 317; and Williston, *Law of Contracts* (ed. 1936), § 21, where the learned author (n. 14) points out that the real difficulty in finding a contract in such cases is that the parties "do not manifest an intent to make a bargain, that is, to exchange a promise for an agreed consideration."]

Ross & Frank Co. v. J. R. Crompton & Bros. [1925] A. C. 445; 94 L. J. K. B. 120; but this will not prevent ordinary business transactions such as sales of goods which may occur in the working out of the agreement from having their normal legal consequences. The reason for the "honour clause" was not disclosed, see [1925] A. C. at 451. [A clause excluding legal liability is not contrary to public policy: *Appleson v. Littlewood* (1939) 1 All E. R. 464, C. A.; a clause of this sort was inserted in a football pool contract; the action was struck out as frivolous.]

There is a common duty to the beneficiary, but no mutual obligation. By obligation we mean the relation that exists between two persons of whom one has a private and peculiar right (that is, not a merely public or official right, or a right incident to ownership or a permanent family relation) to control the other's actions by calling upon him to do or forbear some particular thing.⁷ An agreement might be defined, indeed, as purporting to create an obligation; and the mark which distinguishes an obligation so created from any other kind of obligation is that its contents are wholly determined by the will of the parties.⁸ But for the purposes of English law we prefer to say (what is in effect the same) that an agreement contemplates something to be done or forbore by one or more of the parties for the use of the others or other. The word *use* (representing the Latin *opus* through an Anglo-French form *oepe*, not *usus*) is familiar in English law-books from early times in such a connexion as this.

The common intention of the parties to an agreement is a fact, or inference of fact, which, like any other fact, has to be proved according to the general rules of evidence. When it is said, therefore, that the true intent of the parties must govern the decision of all matters of contract, this means such an intent as a court of justice can take notice of. If A., being a capable person, so bears himself towards B. that a reasonable man in B.'s place would naturally understand A. to make a promise, and B. does take A.'s words or conduct as a promise, no further question can be made about what was passing in A.'s mind. "Mental acts or acts of the will," it has been well said, "are not the materials out of which promises are made."⁹ Under such circumstances, as well as in certain other more special cases, the law does not allow a party to show that his intention was not in truth such as he made or suffered it to appear. But in the common and regular course of things the consent to which the law gives effect is real as well as apparent.

2. WAYS OF DECLARING CONSENT

Two distinct modes of the formation of an agreement are here specified. It is possible, however, to analyse and define agreement as constituted in every case by the acceptance of a proposal. In fact this is done in the Indian Contract Act. And it is appropriate to most of the contracts which occur in daily life, buying and selling, letting and hiring, in short all transactions which involve striking a bargain. One party proposes his terms: the other accepts, rejects, or meets them with a counter-proposal: and thus they go on till there is a final refusal and breaking off, or till one of them names

⁷ Savigny, Syst. i. 398—9; Obl. i. 4 *seq.*

⁸ That is, their will ascertained by the proper rules of interpretation, not necessarily a will completely expressed on the face of the transaction.

⁹ Langdell, Summary, § 180.

terms which the other can accept as they stand. The analysis is presented in a striking form by the solemn question and answer of the Roman Stipulation, where the one party asked (specifying fully the matter to be contracted for): That you will do so and so, do you covenant? and the other answered with the same operative word: I covenant." Yet the importance of proposal and acceptance as elements of contract has, until of late years, been much more distinctly brought out in the Common Law than by writers on the modern civil law.

It seems overstrained to apply this analysis to a case in which the consent of the parties is declared in a set form, as where they both execute a deed or sign a written agreement. Some say that, although there is no proposal or acceptance in the final transaction, the terms of the document must have been settled by a process reducible to the acceptance of a proposal; but this hardly suffices: for the formal instrument has a force apart from and beyond that of the negotiation which fixes its terms. And it may well be, and sometimes is the case, that the parties intend not to be legally bound to anything until their consent is formally declared. In such a case it cannot be said that the proposal and acceptance constitute the final and legal agreement. Take the common case of a lease. There is generally an enforceable agreement, constituted by letters or memorandum, before the lease is executed. But the lease itself is (besides its effect as a transfer of property) a new contract or series of contracts. In this who is the proposer and who the acceptor? Are we to say that the lessor is the proposer because in the common course he executes the lease before the lessee executes the counterpart? Or are we to take the covenants severally, and say that in each one the party with whom it is made is the proposer, and the party bound is the acceptor? What, again, if two parties are discussing the terms of a contract and cannot agree, and a third indifferent person suggests terms which they both accept? Shall we say that he who accepts them first thereby proposes them to the other? And what if they accept at the same moment? The case of competitors in a race who, by accepting rules laid down by the managing committee, become bound to one another to observe those rules," is even stronger. The truth is, as I venture to think, that the exclusive pursuit of the analytical method in dealing with legal conceptions always leads into some strait of this kind, and if the pursuit be obstinate, lands us in sheer fictions.

¹⁰ No doubt the formula *Spondeo? spondeo*, originally the only binding one, and almost certainly of religious origin, was in early times supposed to have a kind of magical effect. But it was necessary that the stipulator should hear the promisor's answer. Cp. Palgrave, *Commonwealth of England*, 2, cxxxvii, cxli. [See also the references in Buckland, *Text-Book of Roman Law* (2nd ed. 1932), 434, note 4.]

¹¹ *Clarke v. Earl of Dunraven (The "Satanstoe")* [1] 789A. C. 59; 66 L. J. P. 1. Here we are driven to say that every party is both a proposer and an acceptor. Cp. p. 19.

3. PROMISE.

Except in the case of simultaneous declaration just mentioned, a promise is regularly either the acceptance of an offer or an offer accepted. Where the promise is embodied in a deed, there is an apparent anomaly ; for the deed is irrevocable and binding on the promisor from the moment of its delivery by him, even before any acceptance by the promisee.¹² But this depends on the peculiar nature of a deed in our law. The party who seals, [signs^{13a}] and delivers a deed witnessing his promise does not, strictly speaking, thereby create an obligation, but rather declares himself actually bound, and that declaration is conclusive, as against himself, under normal conditions. In fact it is only in modern times that special defences, on the ground of fraud and the like, have been allowed to avail a man against his own deed. Thus the questions of consent and acceptance are not open, as ordinary questions of fact, to any discussion. The party has recorded his own promise in solemn form, and cannot require proof that any other positive condition was satisfied. As matter of history, the very object of the Anglo-Norman writing under seal was to dispense with any other kind of proof, and to substitute the authenticated will of the parties themselves for an appeal to the hazards of oath, ordeal, or judicial combat. It is not that an anomalous liability is created ; the contracting party is estopped (special and exceptional causes excepted) from disputing that he is liable. Not the promise, but the deed itself, is irrevocable and operative without need of external confirmation. Whether it is convenient, on the whole, for the purposes of modern law to retain the deed with its ancient qualities is a question beyond our present limits.¹³

4. DEFINITION OF CONTRACT

The term *contract* is here confined to agreements enforceable by law. This restriction, suggested perhaps by the Roman distinction between *contractus* and *pactum*, is believed to have been first introduced in English by the Indian Contract Act. It seems a manifest improvement, and free from the usual drawbacks of innovations in terminology, as it makes the legal meaning of the words more precise without any violent interference with their accustomed use.

5. VOID AGREEMENTS

The distinction between *void* and *voidable* transactions is a fundamental one, though it is often obscured by carelessness of

¹² *Xenos v. Wickham* (1866) L. R. 2 H. L. 296, 323 ; [*Naas v. Westminster Bank Ltd.* (1940) A. C. 366 ; 109 L. J. Ch. 138 ;] *Doe d. Garmon v. Knight* (1826) 5 B. & C. 671 ; 29 R. R. 355 ; and see Pref. to 29 R. R. v—ix.

^{13a} [Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), s. 73.]

¹³ The old law has been altered in various ways in many American States. [In nearly half of them the distinction between sealed and unsealed writings has been abolished : Restatement of Contracts (1932), i, 116.]

language. An agreement or other act which is *void* has from the beginning no legal effect at all, save in so far as any party to it incurs penal consequences, as may happen where a special prohibitive law both makes the act void and imposes a penalty. Otherwise no person's rights, whether he be a party or a stranger, are affected. "A voidable act, on the contrary, takes its full and proper legal effect unless and until it is disputed and set aside by some person entitled so to do. The definitions of the Indian Contract Act on this head are simpler in form than those given above: but certain peculiarities of English law prevent us from adopting the whole of them as they stand. It is not correct as an universal proposition in England that "an agreement not enforceable by law is ~~said~~ to be void," for we have agreements that cannot be sued upon, and yet are recognized by law for other purposes and have legal effect in other ways."

6. VOIDABLE CONTRACTS

The definition here given is from the Indian Contract Act. The idea is not an easy one to express in terms free from objection. Perhaps it would be better to say that a voidable contract is an agreement such that one of the parties is entitled at his option to treat it as never having been binding on him. The Anglo-Indian definition certainly covers rather more than the ordinary use of the terms. Cases occur in English law where, by the effect of peculiar enactments, there is a contract enforceable by one party alone, and yet we should not naturally call it a voidable contract. An example is an agreement required by the Statute of Frauds, 1677 (29 Car. 2, c. 3), s. 4, to be in writing, which has been signed by one party and not by the other. Here the party who has signed is bound and the other is free. "Voidable contract" seems not exactly the appropriate name for such a state of things. And it may even be said that a contract which has been completely performed on one side is literally "enforceable by law at the option of one of the parties" only. But the definition as it stands cannot practically mislead."

Consideration is sometimes treated as if it were among the necessary elements of an agreement.¹¹ But the conception, in the generality with which we use it, combined with its restriction within the limits of exchangeable value of some kind, is peculiar to

¹¹ [But there are exceptional cases. Thus, it is possible for ownership of goods to pass to an infant under a void contract: *Pearce v. Brain* [1929] 2 K. B. 310; 98 L. J. K. B. 559. Cf. P. A. Landon in 48 L. Q. R. (1932), 309—310, and A. M. Finlay in *Bell Yard*, May, 1939, 3—14.]

¹² See Ch. XIII.

¹³ There is a similar but slighter difficulty about the use of the word *void*. A contract when it is fully performed ceases to have legal effect; it is *discharged*, but there is something harsh in saying that it becomes void, a term suggestive of inefficacy rather than of completed effect. Hence in the fifth definition I have introduced the word *discharged* as an alternative.

¹⁴ Thus it is defined in the interpretation clause of the Indian Contract Act.

the Common Law. It does not exist in the jurisprudence of the Continent or of Scotland. In our law we require, for the validity of an informal contract, not merely agreement or deliberate intention, but bargain; a gratuitous promise is not enforceable unless included in the higher obligation of a deed. The rules as to proposal and acceptance cannot be fully understood without bearing this in mind; still the requirement of consideration is a condition imposed by positive law and has nothing universal or necessary about it. Hereafter a fuller discussion will be given: for the present it may serve to describe consideration as an act or forbearance, or the promise thereof, which is offered by one party to an agreement, and accepted by the other, as an inducement to that other's act or promise.

Proposal and acceptance, though not strictly necessary parts of the general conception of Contract, are in practice the normal and most important elements. When agreement has reached the stage of being embodied in a form of words adopted by both parties, the contents of the document and the consent of the parties are generally simple and easily proved facts, and the only remaining question (assuming the other requirements of a valid contract to be satisfied) is what the words mean. The acceptance of a proposal might seem at first sight an equally simple fact. But the complexity of human affairs, the looseness of common speech, the mutability of circumstances and of men's intentions, and the exchange of communications between parties at a distance, raise questions which have to be provided for in detail.

We may have to consider separately whether the offer of a contract was made, what the terms of that offer were; whether there was any acceptance of it; and whether the acceptor was a person to whom the offer was made.

COMMUNICATIONS IN GENERAL

The proposal or acceptance of an agreement may be communicated by words or by conduct, or partly by the one and partly by the other. In so far as a proposal or acceptance is conveyed by words, it is said to be express. In so far as it is conveyed by conduct, it is said to be tacit.¹¹

TACIT PROMISE

It would be as difficult as it is needless to adduce distinct authority for this statement. Cases are of constant occurrence, and naturally in small matters rather than in great ones, where the

¹¹ We shall see that communication of an acceptance may be dispensed with in some cases. But the law knows nothing of constructive communication. A document lying unexamined in a letter-box is not yet communicated, even if the omission to take it out and deal with it be negligent: *Currie v. London City and Midland Bank* [1908] 1 K. B. 293; 77 L. J. K. B. 341. C. A. [This must be qualified by the rules as to acceptance by post (p. 27, *post*)].

proposal, or the acceptance, or both, are signified not by words but by acts. For example, the passenger who steps into a ferry-boat thereby requests the ferryman to take him over for the usual fare, and the ferryman accepts this proposal by putting off. In the case of obtaining a chattel from an automatic machine (where putting in our coin is the acceptance of a standing offer made by the owner of the machine) there is no possibility of accepting in words.

A promise made in this way is often said to be implied: but this tends to obscure the distinction of the real though tacit promise in these cases from the fictitious promise "implied by law," as we shall immediately see, in certain cases where there is no real contract at all, but an obligation *quasi ex contractu*, and in others where definite duties are annexed by rules of law to special kinds of contracts or to relations arising out of them. Sometimes it may be difficult to draw the line. "Where a relation exists between two parties which involves the performance of certain duties by one of them and the payment of reward to him by the other, *the law will imply* (fictitious contract), *or the jury may infer* (true contract) a promise by each party to do what is to be done by him."¹⁹ It was held in the case cited that an innkeeper promises in this sense to keep his guests' goods safely. The case of a carrier is analogous. So where A. does at B.'s request something not apparently illegal or wrongful, but which in fact exposes A. to an action at the suit of a third person, it seems to be not a proposition of law, but an inference of fact which a jury may reasonably find, that B. must be taken to have promised to indemnify A.²⁰

If A. with B.'s knowledge, but without any express request, does work for B. such as people as a rule expect to be paid for, if B. accepts the work or its result, and if there are no special circumstances to show that A. meant to do the work for nothing or that B. honestly believed that such was his intention, there is no difficulty in inferring a promise by B. to pay what A.'s labour is worth.²¹ And this is a pure incidence of fact, the question being whether B.'s conduct has been such that a reasonable man in A.'s position would understand from it that B. meant to treat the work as if done to his express order. The doing of the work with B.'s knowledge is the proposal of a contract, and B.'s conduct is the acceptance. This holds even if A. and B. both believe that the work is being done under an express contract, whereas, by the fraud of X. on whom they both relied to draw up the terms, A. and B. have signed writings naming different prices and there is no express contract at all. For at all events they intended the work to be fairly paid for, and the only solution is to assess the sum payable

¹⁹ Per Cur. *Morgan v. Rarey* (1861) 6 H. & N. 265, 276; 30 L. J. Ex. 191.

²⁰ *Dugdale v. Loaring* (1875) L. R. 10 C. P. 196; 44 L. J. C. P. 197.

²¹ [Cf. *Upton-on-Severn R. D. C. v. Powell* [1942] 1 All E. R. 220.]

at what it is reasonably worth." The like inference cannot be made if the work is done without B.'s knowledge. For by the hypothesis the doing of the work is not a proposal, not being communicated at the time; B. has no opportunity of approving or countermanding it, and cannot be bound to pay for it when he becomes aware of the facts, although he may have derived some benefit from the work; it may be impossible to restore or reject that benefit without giving up his own property.²² If A. of his own motion sends goods to B. on approval, this is an offer which B. accepts by dealing with the goods as owner. If he does not choose to take them, he is not bound to return them; nor indeed is he bound to take any active care of them till A. reclaims them.²³

IMPLIED OR CONSTRUCTIVE PROMISE

But it does not follow that because there is no true contract, there may not be cases falling within this general description in which it is just and expedient that an obligation analogous to contract should be imposed upon the person receiving the benefit. In fact there are such cases: and as the forms of our common law did not recognise obligations *quasi ex contractu* in any distinct manner, these cases were dealt with by the fiction of an implied previous request, which often had to be supplemented (as in the action for money had and received) by an equally fictitious promise. The promise, actual or fictitious, was then supposed to relate back to the fictitious request, so that the transaction which was the real foundation of the matter was treated as forming the consideration in a fictitious contract of the regular type. Here, as in many other instances, the law was content to rest in a compromise between the forms of pleading and the convenience of mankind. These fictions have long ceased to appear on the face of our pleadings, but they have become so established in legal language that it is still necessary to understand them.²⁴ The Indian Act provides for matters of this kind more simply in form and more comprehensively in substance than our present law, by a separate chapter, entitled "Of certain Relations resembling those created by Contract" (ss. 68—72, cp. s. 73). The term *constructive*

²² *Vukery v. Ritchie* (1909) 202 Mass. 247, a curious and it is believed a singular case. It is quite needless here to talk of mistake: the first elements of an express contract were lacking, as there was no real communication between the parties of the terms on which they were willing to contract. [According to Williston, *Contracts*, 4148, the Court held there was no contract, but allowed the plaintiff to recover an amount based on the detriment to him which largely exceeded both the benefit to the defendant and the price for which the work was supposed to be done.]

²³ Cp. *dicta* of Pollock C.B. in *Taylor v. Laird* (1856) 25 L. J. Ex. at 392. The effect of a subsequent express promise to pay for work already done comes under the doctrine of Consideration.

²⁴ It is prudent, however, to inform the sender that the goods sent without request are at his disposal and risk. [The topic is discussed in Winfield, *Text-Book of Tort* (2nd ed.), 396-398.]

²⁵ For details, see notes to *Lamplugh v. Brathwaite* in 1 Sm. L. C., and *Osborne v. Rogers*, 1 Wms. Saund. 357.

Contract may properly be applied to these obligations; it is exactly analogous to "constructive possession" and "constructive notice." It is adopted, we believe for the first time, in the comprehensive work on the Laws of England which bears Lord Halsbury's name. The term *Quasi-Contract* is now generally recognized.¹⁴⁶

A corollary from the general principle of tacit acceptance, which in some classes of cases is of considerable importance, is thus expressed by the Indian Contract Act (s. 8):—

"Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal."

GENERAL OFFERS

This rule, though it might have been more aptly worded, substantially contains the true legal theory of offers of reward made by public advertisement for the procuring of information, the restoration of lost property, and the like. On such offers actions have many times been brought with success by persons who have done the things required as the condition of obtaining the reward.

It appears to have been once held that even after performance an offer thus made did not become a binding promise, because "it is not averred nor declared to whom the words were spoken."¹⁴⁷ But the established modern doctrine is that there is a contract with any person who performs the condition mentioned in the advertisement.¹⁴⁸ That is, the advertisement is a proposal which is accepted by performance of the conditions. It is an offer to become liable to any person who happens to fulfil the contract of which it is the offer.¹⁴⁹ Until some person has done this, it is a proposal and no more. It ripens into a promise only when its conditions are fully satisfied. As Sir W. Anson has well put it, "an offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person."¹⁵⁰

In the same manner each bidding at a sale by auction is a proposal; and when a particular bid is accepted by the fall of the hammer (but not before), there is a complete contract with the particular bidder to whom the lot is knocked down.¹⁵¹

¹⁴⁶ [Cf. Lord Wright, *Legal Essays*, ch. i. ii., Winfield, *Province of Tort*, ch. vii.]

¹⁴⁷ *Weeks v. Tybald* (1604) Noy, 11; 1 Rolle Ab. 6 M. pl. 1.

¹⁴⁸ *Williams v. Carwardine* (1833) 4 B. & Ad. 621; 38 R. R. 328. This is rather laxly expressed; as to a resulting difficulty, see p. 16.

¹⁴⁹ Per Willes J. *Spencer v. Harding* (1870) L. R. 5 C. P. 562. See too *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256, per Lindley, L. J. at 262, per Bowen L. J. at 268; 68 L. J. Ch. 257.

¹⁵⁰ *Principles of the English Law of Contract*, 46, 18th ed. We have no special term of art for a proposal thus made by way of general request or invitation to all men to whose knowledge it comes. The Germans call it *Auslobung*.

¹⁵¹ *Payne v. Case* (1789) 3 T. R. 148; 1 R. R. 679. Prof. Langdell (*Summary*, § 19) thought it would have been better to hold that every bid constitutes "an actual sale subject to the condition that no one else shall bid higher."

The principle is sufficiently clear, but its application is not wholly free from difficulties. These are partly reducible to questions of fact or of interpretation, but partly arise from decisions which appear to give some countenance to a fallacious theory.

OFFER AND INVITATION OF OFFERS

First, we have to consider in particular cases whether some act or announcement of one of the parties is really the proposal of a contract, or only an invitation to other persons to make proposals for his consideration. This depends on the intention of the parties as collected from their language and the nature of the transaction, and the question is one either of pure fact or of construction. Evidently it may be an important one, but due weight has not always been given to it.

The proposal of a definite service to be done for reward, which is in fact a request (in the sense of the ordinary English law of contract) for that particular service, though not addressed to any one individually, is quite different in its nature from a declaration to all whom it may concern that one is willing to do business with them in a particular manner. The person who publishes such an invitation does indeed contemplate that people who choose to act on it will do whatever is necessary to put themselves in a position to avail themselves of it. But acts so done are merely incidental to the real object; they are not elements of a contract but preliminaries. It does not seem reasonable to construe such preliminaries into the consideration for a contract which the parties had no intention of making. Yet there are some modern decisions which seem to disregard the distinction between mere invitations or declarations of intention and binding contracts.²⁰ We shall now examine these cases.

DOUBTFUL CASES

In *Denton v. G. N. Railway Co.*,²¹ the facts were shortly these: The plaintiff had come from London to Peterborough, had done his business there, and wanted to go on to Hull the same night. He had made his arrangements on the faith of the company's current time-tables, and presented himself in due time at the Peterborough station, applied for a ticket to Hull by a train advertised in those tables as running to Hull at 7.20 p.m., and offered to pay the proper fare. The defendant company's clerk refused to issue such a ticket, for the reason that the 7.20 train no longer went to Hull. The fact was that beyond Milford Junction the line belonged to the North Eastern Railway Company, who

²⁰ Compare the judgments in *Harris v. Nickerson* (1873) L. R. 8 Q. B. 286; 42 L. J. Q. B. 171.

²¹ (1856) 5 E. & B. 860; and better in 25 L. J. Q. B. 129, where the case stated is given at length; 105 R. R. 335.

formerly ran a train corresponding with the Great Northern train, for which the Great Northern Railway Company issued through tickets by arrangement between the two companies. This corresponding train had now been taken off by the N. E. R. Co. but the G. N. R. time-table had not been altered. The plaintiff was unable to go farther than Milford Junction that night, and so missed an appointment at Hull and sustained damage. The cause was removed from a County Court into the Queen's Bench, and the question was whether on the facts as stated in a case for the opinion of the Court the plaintiff could recover.²²

Lord Campbell C.J. and Wightman J. held that when any one offered to take a ticket to any of the places to which the train was advertised to carry passengers the company contracted with him to receive him as a passenger to that place according to the advertisement. Lord Campbell treated the statement in the time-table as a conditional promise which on the condition being performed became absolute. His proposition, reduced to exact language, amounts to saying that the time-table is a proposal, or part of a proposal, addressed to all intending passengers and sufficiently accepted by tender of the fare at the station in time for the advertised train. Crompton J.²³ did not accept this view, nor was it necessary to the actual decision: for the Court had only to say whether on the given facts the plaintiff could succeed in any form of action in tort for a false representation; an opinion itself questionable, but not in this place.²⁴ Lord Campbell's opinion has received no later judicial support but rather the contrary, as we shall see towards the end of this chapter.

In *Warlow v. Harrison*,²⁵ a sale by auction was announced as without reserve, the name of the owner not being disclosed. The lot was put up, but in fact bought in by the owner. The plaintiff, who was the highest real bidder, sued the auctioneer as on a contract to complete the sale as the owner's agent. The Court of Queen's Bench held that this was wrong; the Court of Exchequer Chamber affirmed the judgment on the pleadings as they stood, but thought the facts did show another cause of action. Watson and Martin BB. and Byles J. considered that the auctioneer contracted with the highest *bona fide* bidder that the sale should be without reserve. They said they could not distinguish the case from that of a reward offered by advertisement, or of a statement in a time-table, thus holding in effect (contrary to the general rule as to sales by auction) that where the sale is without reserve the contract is completed not by the acceptance of a bidding, but by

²² As to the measure of damages, which here was not in dispute, see *Hamlin v. G. N. R. Co* (1856) 1 H. & N. 408; 26 L. J. Ex. 20, 105 R. R. 649 (where a ticket having been taken there was an unquestionable contract).

²³ The fuller report of his judgment is that in 5 E. & B.

²⁴ See Pollock on Torts, 14th ed. 235, and Preface to 105 R. R.

²⁵ (1858-9) 1 E. & E. 295; 29 L. J. Q. B. 14, in Ex. Ch. 1 E. & E. 309, 29 L. J. Q. B. 14; 117 R. R. 219

the bidding itself, subject to the condition that no higher *bona fide* bidder appears. In other words, every bid is in such a case not a mere proposal but a conditional acceptance. Willes J. and Bramwell B. preferred to say that the auctioneer by his announcement warranted that he had authority to sell without reserve, and might be sued for a breach of such warranty. The result was that leave was given to the plaintiff to amend and proceed to a new trial, which, however, was not done.³⁸ The opinions expressed by the judges, therefore, are not equivalent to the actual judgment of a Court of Error, and have been in fact regarded with some doubt in a later case where the Court of Queen's Bench decided that at all events an auctioneer whose principal is disclosed by the conditions of sale does not contract personally that the sale shall be without reserve.³⁹ Later, again, the same Court held that when an auctioneer in good faith advertises a sale of certain goods, he does not by that advertisement alone enter into any contract or warranty with those who attend the sale that the goods shall be actually sold.⁴⁰ In an analogous case⁴¹ it was decided that a simple offer of stock in trade for sale by tender does not amount to a contract to sell to the person who makes the highest tender.

The doctrine of these cases, though capable, as we have seen, of being expressed in a manner conformable to the normal analysis of contract, goes to the utmost limit warranted by sound principle, and is not likely to be extended. If a man advertises that he has goods to sell at a certain price, does he contract with any one who comes and offers to buy those goods that until further notice communicated to the intending buyer he will sell them at the advertised price?⁴² Again, does the manager of a theatre contract with every one who comes to the theatre and is ready to pay for a place that the piece announced shall be performed, or do directors or committee-men who summon a meeting contract with all who come that the meeting shall be held? Offers to negotiate, in other words expressions of willingness to consider offers, must not be confounded with offers to be bound.⁴³

³⁸ The parties agreed to a *stet processus* [an order of the Court to stay proceedings], see note in the L. J. report.

³⁹ *Maunder v. Witley* (1865) 6 B. & S. 420, 34 L. J. Q. B. 229. (See further *Rainbow v. Hoskins* [1904] 2 K. B. 322; 73 L. J. K. B. 641, which adds nothing on the point before us.) But in *Johnston v. Boyes* [1899] 2 Ch. 73; 68 L. J. Ch. 425, Cozens-Hardy J. was prepared to hold on the authority of *Warlow v. Harrison* that there is a contract by the vendor with the highest bidder that he shall be the purchaser, distinct from the contract of sale. The plaintiff failed on another point.

⁴⁰ *Harris v. Nickerson* (1873) L. R. 8 Q. B. 286; 42 L. J. Q. B. 171.

⁴¹ *Spencer v. Harding* (1870) L. R. 5, C. P. 561; 39 L. J. C. P. 332. In each of these cases we have the unanimous decision of a strong Court. Cp. *Rooke v. Dawson* [1895] 1 Ch. 480; 64 L. J. Ch. 301.

⁴² See per Crompton J. in *Denton v. G. N. R. Co.*, p. 12. [In *Timothy v. Simpson* (1895) 1 C. M. & R., 757, 760, it was held that a shopman is justified in turning out of his shop one who insists that he is entitled to buy goods at a marked price, in spite of the shopman's refusal to sell them at that price. The Transvaal case, *Crawley v. R.* (1909), T. S. 1105; L. L. R. 347, is to the like effect (discussed in 55 L. Q. R. 516-518); see, too, Lord Herschell in *Grainger & Son v. Gough* (1896), A. C. 325, 334.]

⁴³ See per Bowen L. J. *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256, 268.

The distinction between the proposal of a contract and the mere preliminaries is clearly brought out by a later decision of the Court of Appeal. A "proposal" in the usual form was made to a life assurance society; the actuary wrote a letter stating that the proposal had been accepted at a certain premium, but adding this note: "No assurance can take place until the first premium is paid." Afterwards, and before the time limited for that payment, an accident happened to the assured which affected his health, and the society, being informed of this, refused the premium when tendered. It was held that they were entitled to do so. The letter of acceptance did not conclude a contract, first, because the amount of premium was then first specified, and the assured had therefore not consented to that material term of the agreement; next, because of the express declaration of contrary intention.⁴¹

Another matter for remark is the effect of notice of revocation. Suppose the traveller in *Denton's* case had seen and read a new and correct edition of the time-table in the booking-office immediately before he offered to take his ticket. This would clearly have been a revocation of the proposal of the company held out in the incorrect time-table, and accordingly no contract could arise. Similarly if on putting up a particular lot the auctioneer expressly retracted as to that lot the statement of the sale being without reserve, there could be no such contract with the highest *bona fide* bidder as supposed in *Warlow v. Harrison*: "yet the traveller's or bidder's grievance would be the same.

There is also difficulty in determining what are the contents of the contract supposed to be made. In the case of the time-table, for example, we have a contract said to be concluded by the mere demand of a ticket and tender of the fare, a contract not to carry the passenger but to issue a ticket. So in the case of the auction we have a contract alleged to be complete not on the acceptance but on the making of a bid.

Another difficulty (though for English lawyers hardly a serious one) is raised by the suggestion that in these cases the first offer or announcement is not a mere proposal, but constitutes at once a kind of floating contract with the unascertained person, if any, who shall fulfil the prescribed condition.⁴² It is quite settled in our law that there cannot be an acceptance constituting a contract without

⁴¹ *Canning v. Farquhar* (1886) 16 Q. B. Div. 727; 55 L. J. Q. B. 225; followed in *Looker v. Law Union & Rock Ins. Co.*, a stronger case on the facts [1928] 1. K. B. 554; 97 L. J. K. B. 323; cp. *Wallace's case* [1900] 2 Ch. 671; 69 L. J. Ch. 777 (application for shares under an amalgamation agreement by a shareholder in the old company).

⁴² The Continental doctrine that the revocation must be so communicated as to amount to reasonable notice is not admissible in our law: see note to *Frost v. Knight* (1870), L. R. 5 Ex. at 337, and pp. 21—22. As to the somewhat analogous suggestion made in that case, see s. c. in Ex. Ch. L. R. 7 Ex. at 117.

⁴³ Savigny quite justly held that on this theory the right of action could not be supported: there cannot be a *vinculum iuris* with one end loose; but he strangely missed the true explanation. Obl. 2, 90. Yet within a few pages he does give the true analysis for the not dissimilar case of a sale by auction.

communication of the proposal to the acceptor, though the proposer may by words or conduct dispense with express communication of the acceptance to himself. To a certain extent, however, this notion of a floating obligation is countenanced by the language of the judges in the cases above discussed, and it is sometimes supposed to be involved in the much earlier case of *Williams v. Carwardine*.⁴⁵ There a reward had been offered by the defendant for information which should lead to the discovery of a murder. A statement which had that effect was made by the plaintiff, but (as the jury found) for a purpose other than obtaining the reward; it does not appear to whom it was made, or whether with any knowledge that a reward had been offered. The Court held, nevertheless, that the plaintiff had a good cause of action, because "there was a contract with any person who performed the condition mentioned in the advertisement," and the motive with which the information was given was immaterial. The language, doubtless, is loose; but the actual decision is only that in this class of cases no further communication of acceptance is required than performance of the act requested, which may but need not include communication with the proposer. The real point of the defence, that the plaintiff was not shown to have known of the offer at all, was not clearly made. This now falls under a wider principle, see p. 25. On principle there cannot be an acceptance constituting a contract without any communication of the proposal to the acceptor, and there is no real authority to the contrary.⁴⁶

PERFORMANCE IN FACT

The question may arise whether the party claiming the reward has in fact performed the required condition according to the terms of the advertisement. In *Carhill v. Carbolic Smoke Ball Co.*,⁴⁷ it arose in a curious manner. The advertisement of a remedy for influenza and similar diseases offered a sum of money to any one who should contract such disease "after using" the remedy according to the directions supplied with it, and for a certain time.

⁴⁵ 1833) 4 B. & Ad. 621, s. c. at N. P. 5 C. & P. 566; 38 R. R. 328. *Gibbons v. Procter* 1891, 64 L. T. 704, is a solitary decision allowing a person to recover a reward for information given before the offer of reward was or could be known to him. The Court, whose reasons as reported are obscure, must have misunderstood *Williams v. Carwardine*. Cf. Langdell, § 3.

⁴⁶ [If A. and B., each in ignorance of what the other has done, writes a letter to the other and A. in his letter offers to sell goods to B. at a fixed price while B. in his letter offers to buy the goods at that price, and the letters cross in the post, is there a contract? A majority of the Court in *Tinn v. Hoffman & Co.* (1873) 29 L. T. 271, expressed an opinion that there was none. The American Restatement of Contracts, §§ 23, 53, is to the like effect; see, too, Williston, Contracts, § 23.

Cases are imaginable in which an offeree might well be deemed to have acquired knowledge of a proposal earlier than he actually did acquire it; e.g., where the delay in becoming aware of it is due to his own fault, he surely ought not to be allowed to take advantage of it; see 55 L. Q. R. (1939), 503-504-1 [1893] 1 Q. B. 256; 62 L. J. Q. B. 257, C. A. The judgments are instructive.

buyer who used the remedy as directed, and caught influenza while still using it, was held entitled to the sum offered, notwithstanding the argument strenuously urged for the defendant that the offer was too vague to be taken seriously, and the performance could not be verified.

The Supreme Court of the United States has held that a general proposal made by public announcement may be effectually revoked by an announcement of equal publicity, such as an advertisement in the same newspaper, even as against a person who afterwards acts on the proposal not knowing that it has been revoked. For "he should have known," it is said, "that it could be revoked in the manner in which it was made."⁴⁸ In other words, the proposal is treated as subject to a tacit condition that it may be revoked by an announcement made by the same means. There does not appear to be any English authority.

Other kinds of general proposals have also been dealt with as capable of acceptance by any one to whose hands they might come.

In *Ex parte Asiatic Banking Corporation*,⁴⁹ the following letter of credit had been given by Agra and Masterman's Bank to Dickson, Tatham and Co.

"No. 394 You are hereby authorized to draw upon this bank at six months' sight, to the extent of £15,000 sterling, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to indorse particulars on the back hereof. The bills must specify that they are drawn under credit No. 394. of the 31st of October. 1865."

The Asiatic Banking Corporation held for value bills drawn on the Agra and Masterman's Bank under this letter; the Bank stopped payment before the bills were presented for acceptance, and Dickson, Tatham and Co. were indebted to the Bank in an amount exceeding what was due on the bills: but the Corporation claimed nevertheless to prove in the winding up for the amount, one of the grounds being "that the letter shown to the person advancing money constituted, when money was advanced on the faith of it, a contract by the Bank to accept the bills." Cairns L. J. adopted this view, holding that the letter did amount to "a general invitation" to take bills drawn by Dickson, Tatham and Co. on the Agra and Masterman's Bank, on the assurance that the Agra and Masterman's Bank would accept such bills on presentation; and that the acceptance of the offer in this letter by the Asiatic Banking Corporation constituted a binding legal contract against

⁴⁸ *Shroy v. United States* (1875) 92 U. S. 73 [Adopted in Restatement of Contracts (1932), § 43.]

⁴⁹ (1867) L. R. 2 Ch. 391; 46 L. J. Ch. 222. Cp. *Bhugwandass v. Netherlands, &c. Insce. Co.* (1888) 14 App. Ca. (J. C.) 83, decided on the ground that the "open cover" was a proposal of insurance addressed to any one having insurable interest in the cargo.

the *Agra and Masterman's Bank*." The difficulties above discussed do not seem to exist in this case. From an open letter of credit (containing too in this instance an express request to persons negotiating bills under it to indorse particulars) there may be inferred without any violence either to law or to common reason a proposal or request by the author of the letter to the mercantile public to advance money on the faith of the undertaking expressed in the letter. This undertaking must then be treated as addressed to any one who shall so advance money; the thing to be performed by way of consideration for the undertaking is definite and substantial, and is in fact the main object of the transaction. If any question arose as to a revocation of the proposal, it would be decided by the rules which apply to the revocation of proposals made by letter in general."

The bearing of the Statute of Frauds on contracts made by advertisements or general offers was once incidentally discussed in the Judicial Committee of the Privy Council.⁸⁰ It is settled that the requirements of the statute in the cases where it applies are generally not satisfied unless the written evidence of the contract shows who both the contracting parties are. But it had been suggested in the Colonial Court that in the case of a proposal made by advertisement, where the nature of the contract (e.g., a guaranty) was such as to bring it within the statute, the advertisement itself might be a sufficient memorandum, the other party being indicated as far as the nature of the transaction would admit.⁸¹ The Judicial Committee, however, showed a strong inclination to think that this view is not tenable, and that in such a case the evidence required by the statute would not be complete without some further writing to show who in particular had accepted the proposal. It was observed that as a matter of fact the cases on advertisements had been of such a kind that the statute did not apply to them, and it was a mere circumstance that the advertisement was in writing.⁸² We are not aware of the point having arisen in any later case.

The speculative question has been asked at what point of time

⁸⁰ In *Scott v. Pilkington* (1862) 2 B. & S. 11, 31 L. J. Q. B. 81, on the other hand, an action was brought on a judgment of the Supreme Court of New York, on a very similar state of facts. The decision of the English Courts was that the law applicable to the case was the law of New York, and that the judgment having been given by a court of competent jurisdiction in a case to which the local law was properly applicable, there was no room to question its correctness in an English Court. So far as any opinion was expressed by the Court as to what should have been the decision on the same facts in a case governed by the law of England, it was against any right of action at law being acquired by the bill-holders. This however, was by the way, and as a concession to the defendants, and is therefore no positive authority.

⁸¹ See however *Shuey v. United States*, p. 17.

⁸² *Williams v. Byrnes* (1863) 1 Moo. P. C. N. S. 154; 138 R. R. 487.

⁸³ Per Stephen C. J. (N. S. W.) at 167, 184.

⁸⁴ See 1 Moo. P. C. N. S. at p. 198. The language of the headnote is misleading; there is no suggestion in the judgment of any such proposition of law as that the Statute of Frauds is not applicable to contracts made in this manner.

Acceptance by an act is complete, and it is suggested that A. may request B. to do something, say to move a piece of furniture, for reward which A. names, that B may do a substantial part of the work, and A. may revoke his offer any time before the work is complete, leaving B. without remedy or at least any remedy on a contract. But surely the acceptance is complete as soon as B. has made an unequivocal beginning of the performance requested, a "commencement d'exécution," to use the term familiar in French law. Whether anything is payable before the whole of the work is done depends on the terms express or implied of A.'s offer on which B. acts. As a matter of fact A.'s offer will almost always be a conditional offer, and will become, on acceptance, a promise conditional on the work being done within a reasonable time and otherwise competently. Such a conditional promise is still a promise, and wholly different from a revocable offer."

It is possible for a contract to be formed without any direct communication between the parties or any persons who in an ordinary sense are their agents. Where competitors enter for a club race under express rules prescribed or adopted by the managing committee, and those rules declare that any competitor breaking them shall be liable for damages arising therefrom, this is sufficient to create a mutual contract between the competitors to be liable for and discharge any such damages." Here the secretary of the club who receives the entries may be regarded as an agent to receive, as between the competitors, the offer of every competitor to be bound by the rules, and the acceptance of every other competitor; and his authority to do so is implied in the nature of the transaction." There may be cases of this kind in which it would be hard, if the question were raised, to determine whether the parties intended to create a legal or a merely honorary obligation.

ONLY OFFERERS CAN ACCEPT

Having seen that it is possible for offers to be addressed not only to persons not named, but to persons wholly unascertained at the time, we note by way of caution that nevertheless an offer, in order to become a promise, must be accepted by some one to whom it is

¹¹ A modern learned author, Clarence D. Ashley, *The Law of Contracts*, Boston, 1911, 78, "Consideration in Unilateral Contracts," assumes that the act which is sufficient to constitute acceptance must be co-extensive with the whole performance requested. Now acceptance is one thing and consideration quite another. A more plausible query is whether the beginning of performance in acceptance of a request implies any promise to complete the performance. But the request was not for a counter-promise but for an act or series of acts. In short, the doubts are too clever; yet something like them seems to have weighed with the learned framers of the *Restatement*.

¹² *Clarke v. Earl of Dunraven (The "Satanstia")* [1897] A. C. 59; 66 L. J. P. 1. The only question seriously argued in the H. L. was on the construction of the rules. It would seem the contracts must all be referred to the date when the entries are completed. Cp. p. 5.

¹³ [See *Williston, Contracts*, 79-80, where the promise of the competitor is regarded as having been made with the regatta committee.]

in substance and in fact addressed. This principle is elementary, but sometimes may be disguised by peculiar facts. A. sends an order for goods addressed to X., a tradesman. X. has in fact sold the business to Z., of which A. is ignorant. Z. sends the goods to A., who receives them as coming from X. As A. never offered to buy from Z. no contract is formed between A. and Z., and Z. cannot recover the price of the goods from A." In like manner Z. cannot make a contract between A. and B. by falsely representing himself as A. and in that name dealing with B." Even such simple cases could not happen without an element of misunderstanding. Less simple ones cannot well be separated from those commonly treated (in part for reasons belonging to the technical history of equitable jurisdiction) under the head of Mistake. In that connexion we shall return to them later.

REVOCATION

An offer may be revoked at any time before acceptance, but not afterwards.

For before acceptance there is no agreement, and therefore the proposer cannot be bound to anything." So that even if he purports to give a definite time for acceptance, he is free to withdraw his proposal before that time has elapsed. He is not bound to keep it open unless there is a distinct contract to that effect, founded on a distinct consideration. If in the morning A. offers goods to B. for sale at a certain price, and gives B. till four o'clock in the afternoon to make up his mind, yet A. may sell the goods to C. at any time before four o'clock, so long as B. has not accepted his offer." But if B. were to say to A.: "At present I do not know, but the refusal of your offer for a definite time is worth something to me; I will give you so much to keep it open till four o'clock," and

¹¹ *Boulton v Jones* 1887 2 H. & N. 564, 27 L. J. Ex. 117, 115 R. R. 695. [See p. 379 *post*, where it is pointed out that A. had a set-off against X. This would make the identity of X. an essential element in the order, but where a reasonable person would regard the personality of the shopkeeper as unimportant, it is suggested that one who orders goods from a shop is willing to contract with the person who happens to be the shopkeeper for the time being; Salmond & Winfield, *Contracts*, 188.]

¹² Undisputed in *Greer v. Douns Supply Co* [1927] 2 K. B. 28, 96 L. J. K. B. 534, C. A.

¹³ The same rule applies to a proposal to vary an existing agreement. *Gilkes v. Leonino* (1858) 4 C. B. N. S. 485.

¹⁴ Admitted in *Cooke v. Oxley* (1790) 1 R. R. 783, 3 L. R. 633; *affd.* in Ex. Ch., see reporter's note. The decision goes farther, and has been the subject of much criticism. For the conflicting views see Benjamin on Sale, 7th ed. 79, and Langdell's Summary, § 182. I adhere to Langdell's view that it cannot be supported in any sense. [So, too, Williston, *Contracts*, § 50.] If the defendant's offer had been revoked before the plaintiff's acceptance, it was for the defendant to plead and prove it. The decision would have been right if the action had been on a promise to keep the offer open, as seems to be supposed by Lush J. in *Stevenson v. McLean* (1880) 5 Q. B. D. at 351; 49 L. J. Q. B. 701. But the action was not for delivering goods, as on a complete bargain and sale; and this was insisted upon in the argument. The Court may possibly have supposed that acceptance of an offer made any appreciable time before was not complete without a fresh sign of consent from the proposer. Cp. *Kennedy v. Lee* (1817) 3 Mer. 441; 17 R. R. 110; *Head v. Diggon* (1828) 3 M. & R. 97, showing that this fallacy was current much later.

He were to agree to this, then A. would be bound to keep his offer open, not by the offer itself, but by the subsequent independent contract." If A. on Wednesday hands to B. a memorandum offering to sell a house at a certain price, with a postscript stating that the offer is to be "left over" till nine o'clock on Friday morning, A. may nevertheless sell the house to C. at any time before the offer is accepted by B. If B., with notice of A.'s dealing with C., tenders a formal acceptance to A., this is inoperative. [Such was the decision in *Dickinson v. Dodds*.] One reason for it was that there was no consideration for keeping the offer open for the specified time. It is submitted that this is unsound. A. stated in his offer the exact price of the house. That was the consideration on his side. Why should the law insist that he was entitled to extra consideration for allowing the offeree a certain time within which he could accept? Presumably he might have taken that very factor into account in fixing the sum that constituted the price, i.e., he may have fixed it rather higher than he would have done if no time had been specified. It is different in modern Roman law. There a promise to keep a proposal open for a definite time is treated as binding, as indeed there appears no reason why it should not be in a system to which the doctrine of consideration is foreign; nay, there is held in effect to be in every proposal an implied promise to keep it open for a reasonable time. In our own law the effect of naming a definite time in the proposal is simply negative and for the proposer's benefit; that is, it operates as a warning that an acceptance will not be received after the lapse of the time named, not as an undertaking that if given sooner it shall be. In fact, the proposal so limited comes to an end of itself at the end of that time, and there is nothing for the other party to accept. This leads us to the next rule, namely:—

CONDITIONS OF OFFER

The proposer may prescribe a certain time within which the proposal is to be accepted, and the manner and form in which it is to be accepted. If no time is prescribed, the acceptance must be communicated to him within a reasonable time. In neither case is

⁶¹ We find something like this in early Germanic law, where earnest on a sale was not payment on account of a completed contract, but the price of the seller's forbearance to sell to any other person for a limited time. Heusler, *Int. des D. P. R.* ii 256, cp. *Glanv.* x. 14, showing the law to be then still doubtful in England.

⁶² (1876) 2 Ch. Div. 463; 45 L. J. Ch. 777. The case suggests, but does not decide, another question, which will be presently considered. *Contra* Langdell, *Summary*, 244; and on principle perhaps rightly.

⁶³ [The Law Revision Committee have recommended the abolition of the rule (1937, *Cmd.* 5449, 22–23, 31). As to American law, see *Williston, Contracts*, § 61, and *Restatement of Contracts*, § 47 of which requires "a collateral contract" by the offeror that he will not revoke his offer during the term specified for its duration.]

⁶⁴ See *L. R.* 5 Ex. 337, n.

⁶⁵ See *Offord v. Davis* (1862) 12 C. B. N. S. 748; 33 R. R. 491, where the only arguable question was whether the defendant's guaranty limited in time was a contract, or only a standing offer so limited.

the acceptor answerable for any delay which is the consequence of the proposer's own default. If no manner or form is prescribed, the acceptance may be communicated in any reasonable or usual manner or form.

This is almost self-evident, standing alone; we shall see the importance of not losing sight of it in dealing with the difficulties to be presently considered. Note, however, that though the proposer may prescribe a form or time of *acceptance*, he cannot prescribe a form or time of *refusal*, so as to fix a contract on the other party if he does not refuse in some particular way or within some particular time."

Among other conditions, the proposal may prescribe a particular *place* for acceptance, and if it does so, an acceptance elsewhere will not do." The question in cases of this kind is whether the condition as to time, place, or manner of acceptance was in fact part of the terms of the proposal.

There is direct authority for the statement that the proposal must at all events be taken as limited to a reasonable time;" nor has it ever been openly disputed. The rule is obviously required by convenience and justice. It may be that the proposer has no means of making a revocation known (e.g., if the other party changes his address without notice to him, or goes on a long journey), and he cannot be expected to wait for an unlimited time. Words of present obligation (but not capable of operating to that effect) have been held to constitute an offer with limit of time."

LIMITS OF REVOCATION

A proposal is revoked by communication to the other party of the proposer's intention to revoke it, and the revocation can take effect only when that communication is made before acceptance.

The communication may be either express or tacit, and notice received in fact, whether from the proposer or from any one in his behalf or otherwise, is a sufficient communication.

A person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn." But that person's refusal or counter-offer puts an end to the original offer."

The first point under this head is that an express revocation communicated after acceptance, though determined upon before

⁶⁷ *Falthouse v. Bindley* (1862-63) 11 C. B. N. S. 869, 875; 31 L. J. C. P. 204; 132 R. R. 734, *affd.* very shortly in Ex. Ch. 11 W. R. 429, see Preface to 135 R. R.

⁶⁸ *Elason v. Henshaw* (1819) (Sup. Ct. U. S.) 4 Wheat. 225; Langdell Sel. Ca. on Cont. 48.

⁶⁹ *Baile's case* (1868) L. R. 3 Eq. 428; L. R. 3 Ch. 592; 37 L. J. Ch. 255; *Ramsgate Hotel Co. v. Montefiore*; *Sams Co. v. Goldsmid* (1866) L. R. 1 Ex. 109; 35 L. J. Ex. 90. An earlier indication of judicial opinion in Ex. Ch., is mentioned in the reporter's note to *Powers v. Fowler* (1855) 4 E. & B. at 519; 99 R. R. at 591.

⁷⁰ *Hindley's case* [1896] 2 Ch. 121; 65 L. J. Ch. 591, C. A.

⁷¹ *Lord Herschell, Henlhorn v. Fraser* [1892] 2 Ch. 27, 31; 61 L. J. Ch. 373; 66 L. T. 439.

⁷² *Hyde v. Wrench* (1840) 3 Beav. 334; 52 R. R. 144.

the date of the acceptance, is too late. This was decided in 1880 in two distinct cases.¹³ It will suffice to give shortly the facts of the earlier one.¹⁴ The defendants at Cardiff wrote to the plaintiffs at New York on the 1st of October, 1879, offering for sale 1000 boxes of tinplates on certain terms. Their letter was received on the 11th, and on the same day the plaintiffs accepted the offer by telegraph, confirming this by a letter sent on the 13th. Meanwhile the defendants on the 8th of October had posted a letter withdrawing their offer of the 1st: this reached the plaintiffs on the 20th. The plaintiffs insisted on completion of the contract; the defendants maintained that there was no contract, the offer having been, in their view, withdrawn before the acceptance was either received or despatched. Lindley J. stated as follows the questions to be considered: "1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?" The first he answered in the negative, on the principle 'that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all.' The second he likewise answered in the negative, on grounds of both principle and convenience, and notwithstanding an apparent, but only apparent, inconsistency with the rule as to acceptances by letter which will be presently considered. This doctrine has been accepted by the Supreme Court of the United States.¹⁵

IMPLICIT REVOCATION

It seems impossible to find any reason in principle why the necessity for communication should be less in the case of a revocation which is made not by words but by conduct, as by disposing to some one else of a thing offered for sale. Nor does it seem practicable in the face of the decisions just cited, though they do not actually cover such a case, to say that any such difference is recognized by the law of England. The authority most in point, *Dickinson v. Dodds*,¹⁶ is not of itself decisive. The facts were these. A. offered in writing to sell certain houses to B., adding a statement that the offer was to be "left over" until a time named; which statement, as we have already seen, could have no legal effect unless to warn B. that an acceptance would not be received at any later time. B. made up his mind the next morning to

¹³ *Byrne v. Van Tienhoven*, (1880), 5 C. P. D. 344; 49 L. J. C. P. 316; *Stevenson v. McLean* (1880) 5 Q. B. D. 346, 49 L. J. Q. B. 701. *Henthorn v. Fraser* [1892] 2 Ch. 27, 61 L. J. Ch. 373, fully confirms these decisions.

¹⁴ *Byrne v. Van Tienhoven*, last note.

¹⁵ *Patrick v. Bowman* (1893) 149 U. S. 411, 424.

¹⁶ (1876) 2 Ch. Div. 463; 45 L. J. Ch. 777. One or two immaterial details are omitted in stating the facts.

accept, but delayed communicating his acceptance to A. In the course of the day he heard from a person who was acting as his agent in the matter that A. had meanwhile offered or agreed to sell the property to C. Early on the following day (and within the time limited by A.'s memorandum) B. sought out A. and handed a formal acceptance to him; but A. answered, "You are too late. I have sold the property." It was held in the first instance by Bacon V.C. that A. had made to B. an offer which up to the time of acceptance he had not revoked, and that consequently there was a binding contract between A. and B. But in the Court of Appeal it was said that, although no "express and actual withdrawal of the offer" had reached B., yet by his own showing B., when he tendered his acceptance to A., well knew that A. had done what was inconsistent with a continued intention of contracting with B. Knowing this, B. could not by a formal acceptance force a contract on A." It does not appear that the knowledge which B. in fact had was conveyed to him or his agent by or through A., or any one intending to communicate it on A.'s behalf. Yet the Court held that knowledge in point of fact of the proposer's changed intention, however it reaches the other party, will make the proposer's conduct a sufficient revocation. But what if B. had communicated his acceptance to A. without knowing anything of A.'s dealings with C.? This question remains open, and must be considered on principle.

Suppose that A. offers to sell one hundred tons of iron to B., not designating any specific lot of iron, and that B. desires time to consider, and A. assents. Then A. meets with C., they talk of the price of iron, and C. offers A. a better price than he has asked from B., and they strike a bargain for a hundred tons. Then B. returns, and in ignorance of A.'s dealings with C. accepts A.'s offer formerly made to him. Here are manifestly two good contracts. A. is bound to deliver 100 tons of iron to B. at one price, and 100 tons to C. at another. And if A. has in fact only 100 tons, and was thinking only of those hundred tons, it makes no difference. He would be equally bound to B. and C. if he had none. He must deliver them iron of the quantity and quality contracted for, or pay damages. How then will the case stand if, other circumstances being the same, the dealing is for specific goods, or for a house? Here it is impossible that A. should perform his agreement with both B. and C., and therefore they cannot both make him perform it; but that

⁷⁷ [So, too, *Cartwright v. Hoogstool* (1911) 105 L. T. 628. The American Restatement of Contracts, § 42, requires the information given to B. to be reliable. See Williston, Contracts, §§ 57, 57A, for a general statement of American law on indirect communication of revocation.] The headnote of *Dickinson v. Dodds* says: "Semble, that the sale of the property to a third person would of itself amount to a withdrawal of the offer, even although the person to whom the offer was first made had no knowledge of the sale." But this seems unwarranted by the judgments. See the remarks of James L.J. at 472, and of Mellis L.J. at 475, and per Lord Herschell, *Henthorn v. Fraser* [1892] 2 Ch. at 33.

is no reason why he should not be answerable to both of them. The one who does not get performance may have damages. It remains to ask which of them shall have the option of claiming performance, if the contract is otherwise such that its performance can be specifically enforced. The most convenient solution would seem to be that he whose acceptance is first in point of time should have the priority: for the preference must be given to some one, and the first acceptance makes the first complete contract. There is no reason for making the contract relate back for this purpose to the date of the proposal. This is consistent with everything that was really decided in *Dickinson v. Dodds*.⁷⁸ The reasons given for that decision cannot, it is submitted, be relied on. [See p. 21.]

It is right to add that *Cooke v. Oxley*⁷⁹ may be so read as to support the opinion that a tacit revocation need not be communicated at all. But the apparent inference to this effect is expressly rejected in *Stevenson v. McLean*.⁸⁰ If *Cooke v. Oxley* be still authority for anything, it is not authority for that.

COMMUNICATION OF ACCEPTANCE

It is to be understood throughout that acceptance must be definite. Communication by an offeree's agent of his authority to accept is not acceptance.⁸¹

LIMITS OF ACCEPTANCE OR OF ITS REVOCATION

There is a material distinction, though it is not fully recognized in the language of our authorities, between the acceptance of an offer which asks for a promise, and an offer which asks for an act, on the condition of the offer becoming a promise. In the former case the proposed contract is called bilateral, in the latter unilateral; these terms have long been current in America⁸² but are little used in England. Where the acceptance is to consist of a promise, it must be communicated to the proposer.⁸³ But where the acceptance is to consist of an act—as despatching goods ordered by post—it seems that no further communication of the acceptance is necessary than the performance of the proposed act. It is now settled that the proposer may dispense with express communication, and an intention to dispense with it may be somewhat readily inferred from the nature of the transaction.⁸⁴ Thus a person

⁷⁸ 2 Ch. Div. 463; 45 L. J. Ch. 777. Note that the suit was for specific performance, and cp. Langdell, Summary, 245-6, and Anson, 19th ed., 47-48. There was also a claim for damages, but apparently nothing was said about it.

⁷⁹ (1790) 1 R. R. 783; 3 T. R. 653.

⁸⁰ (1880) 5 Q. B. D. at 351; 49 L. J. Q. B. 701.

⁸¹ *Kennedy v. Thomassen* [1929] 1 Ch. 426; 98 L. J. Ch. 98.

⁸² [Williston, Contracts, § 13; Restatement of Contracts, § 12.]

⁸³ *Mozley v. Tinkler* (1835), 1 C. M. & R. 692; 40 R. R. 675; *Russell v. Thornton* (1859), 4 H. & N. 788, 798, 804; 29 L. J. Ex. 9; *Hebb's case* (1867), L. R. 4 Eq. 9.

⁸⁴ *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256, per Lindley L. J. at 262-3. Bowen L. J. at 269; cp. Lord Blackburn's *dicta* cited below.

making an offer to a public authority can effectually dispense with any special communication to himself of a public act of acceptance made in due form. So held without difficulty by the Judicial Committee, going perhaps a little beyond the terms of any decision in English jurisdiction." In America the general rule in the case of an unilateral contract, where the offeror is the promisor, is that no communication is needed beyond the performance of the act requested."

Further, even when the acceptance consists of a promise, and therefore must be communicated, any reasonable means of communication prescribed or contemplated by the proposer are deemed sufficient as between the acceptor and himself.

If an acceptance by means wholly or partly beyond the sender's control, such as the public post or telegraph," is contemplated by the parties, then an acceptance so despatched is complete as against the proposer from the time of its despatch out of the sender's control; and, what is more, is effectual notwithstanding any miscarriage or delay in its transmission happening after such despatch.

The parties are presumed to contemplate acceptance by post or telegraph whenever the circumstances are such as to make such acceptance reasonable in the usual course of business."

It should seem obvious that an uncommunicated mental assent, since it is neither the communication of a promise nor an overt act of performance, cannot make a contract in any class of cases; though so late as 1877 it was found needful to re-assert this principle in the House of Lords." At the same time a proposer who prescribes a particular manner of communication may preclude himself from afterwards showing that it was not in fact sufficient. In Lord Blackburn's words, "when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing there is a complete contract." The most important application of this exception will come before us immediately. But it is not true "that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer," will, as a rule, serve to conclude a contract.

¹¹ *Dominion Building Corporation v. The King* [1933] A. C. 533; 102 L. J. P. C. 176; the point really in dispute was whether a certain statutory requirement was applicable. [Williston, *Contracts*, §§ 68—69a; *Restatement of Contracts*, §§ 58—57.]

¹² As to the telegraph being on the same footing as letter post, *Cowan v. O'Connor* (1888) 20 Q. B. D. 640; 57 L. J. Q. B. 401.

¹³ *Henthorn v. Fraser* [1892] 2 Ch. 27; 61 L. J. Ch. 373. As to the limits of the usual course in sending money by post, *Mitchell-Henry v. Norwich Union, &c. Society* [1918] 2 K. B. 67; 87 L. J. K. B. 695, C. A.

¹⁴ *Brogden v. Metropolitan Ry. Co.* (1877) 2 App. Ca. at 688 (Lord Selborne), at 691 (Lord Blackburn) and at 697 (Lord Gordon). The judgments in the Court below which gave rise to these remarks are not reported.

CONTRACTS BY CORRESPONDENCE

We now come to the special rules which, after much uncertainty, have been settled by our Courts as to contracts entered into by correspondence between persons at a distance. Before dealing with authorities it may be useful to show the general nature of the difficulties that arise. We start with the principle that the proposer is bound from the date of acceptance. Then we have to consider what is for this purpose the date of acceptance, a question of some perplexity. It appears just and expedient, as concerning the accepting party's rights, that the acceptance should date from the time when he has done all he can to accept, by putting his affirmative answer in a determinate course of transmission to the proposer. From that time he must be free to act on the contract as valid, and disregard any revocation that reaches him afterwards. Hence this must be the one point, if there is only one (as the common law theory of the formation of contracts in general seems to require), at which the contract is irrevocable and absolute. Still, are we to hold it absolute for all purposes? Shall the proposer be bound, though, without any default of his own, the acceptance never reach him? Shall the acceptor remain bound, though he should afterwards despatch a revocation which arrives with or even before the acceptance? The first question is answered by our Courts in the affirmative; the second is still open. At first sight a negative answer to both appears the more reasonable. The proposer cannot, at all events, act on the contract before the acceptance is communicated to him; as against him, therefore, a revocation should be in time if it reaches him together with or before the original acceptance, whatever the relative times of their despatch. On the other hand, it seems hard that he should be bound by an acceptance that he never receives. He has no means of making sure whether or when his proposal has been received," or whether it is accepted or not, for the other party need not answer at all. The acceptor might more reasonably be left to take the more avoidable risk; or, to put it another way, it might have been held to be an implied condition in proposals by correspondence that acceptance shall be actually received. This, however, would not be applicable where the proposal was a request for an act to be immediately done.

On the whole our Courts have thought it best not to depart from the common law doctrine that an agreement is finally concluded at some one point by exchange of a promise either for an act or for a reciprocal promise, leaving the parties to guard themselves in their own way. A man may, if he think fit, make his offer expressly conditional on actual receipt of an acceptance, or reserve in his

¹¹ It is possible to obtain an official acknowledgment of the due delivery of a registered letter; but this does not prove that the contents have actually come to the knowledge of the addressee.

acceptance liberty of revocation by any communication arriving earlier or at the same time.

It is clear that the proposer may specify the mode, at least any reasonable mode, of acceptance; but in most agreements by correspondence the post or telegraph is used as a matter of course; it appears simpler to say that the usual means of communication between parties at a distance are deemed to be authorized by him who opens the correspondence⁹⁹ than to call the post-office, as some of the earlier cases do, the common agent of both parties.

Further, it would seem, though nothing yet laid down goes beyond suggestion, that even a revocation despatched after the acceptance and arriving before it would be inoperative, unless liberty to revoke in this manner had been reserved in the terms of acceptance. In the extreme case of the acceptance wholly miscarrying, so that the revocation were the only notice received by the proposer that there ever had been an acceptance, this may be thought a startling consequence, but, as we have said, parties can take their own precautions when they know for certain what the rule is. What really matters in business is to have a settled rule and not make it doubtful by refined exceptions.

Turning to the authorities, we need not dwell much on the earlier cases, of which an account is given in the Appendix.¹⁰⁰ They established that an acceptance by post, despatched in due time as far as the acceptor is concerned, concludes the contract notwithstanding delay in the despatch by the proposer's fault (as if the offer is misdirected), or accidental delay in the delivery; and that the contract, as against the proposer, dates from the posting, so that he cannot revoke his offer after the acceptance is despatched.

Until 1879 it was uncertain whether a letter of acceptance that miscarried altogether was binding on the proposer. In that year the point came before the Court of Appeal.¹⁰¹ An application for shares in the plaintiff company, whose office was in London, was handed by the defendant to a country agent for the company. A letter of allotment, duly addressed to the defendant, was posted from the London office, but never reached him. The company went into liquidation, and the

⁹⁹ *Henthorn v. Fraser* [1892] 2 Ch. 27; 61 L. J. Ch. 373.

¹⁰¹ See Appendix, Note 2. For Continental opinions see Prof. J. Kohler, *Vertrag unter Abwesenden*, in *Archiv. für bürgerl. Recht*, March, 1889; Valéry, *Des Contrats par Correspondance*, Paris, 1895; Albert Cohen, Paris, 1921. The provisions of European codes and of the Indian Contract Act are not, in my opinion, appreciably better than our rules. [A more recent account of the attitude of various Continental and other countries is given by Dr. Jacques de Vischer in 19 *Revue de Droit International* (1938), 88—114. His article is summarized in 55 L. Q. R. (1939), 506—507. The English rule is followed in Canada, New Zealand, New South Wales and the United States; in South Africa, the position is somewhat uncertain: *ib.* 505—506. The arguments for and against the English rule are set out *ib.* 508—512, where it is pointed out that different legal systems have answered the question, "What facts will satisfy a Court of law that there has been an agreement?" in at least five different ways with respect to contracts by correspondence. There is something to be said for adopting different rules for different species of contracts. It might well be urged that a proposal of marriage contained in a letter ought not to be regarded as accepted until the letter of acceptance is actually delivered to the proposer.]

¹⁰² *Household Fire Insurance Co. v. Grant* (1879) 4 Ex. Div. 216; 48 L. J. Ex. 577; Finch Sel. Cas. (2nd ed.) 133.

liquidator sued for the amount due on the shares. It was held by Thesiger and Baggallay L.JJ. that "if an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery";⁸⁸ that, on the grounds and reasoning of the authorities, this extends to the case of a letter wholly failing to reach its address; that in the case in hand the defendant must under the circumstances be taken to have authorized the sending by post of a letter of allotment; and that in the result he was bound. They were disposed to limit the rule "to cases in which, by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized."⁸⁹ Cases outside these limits, however, are not likely to be frequent, and in *Henthorn v. Fraser*⁹⁰ it is decided that an offer delivered by hand may authorize, or, in the terms preferred by the Court, contemplate, an acceptance by post." In *Grant's* case Bramwell L.J. delivered a vigorous dissenting judgment, in which he pointed out among other things the absurdity of treating a revocation which overtakes the acceptance as ineffectual, but relied mainly on the broad ground that a letter not delivered at all is not a communication." In *Henthorn v. Fraser*, Kay L.J. did not conceal his dissatisfaction with the reasoning of the authorities by which the Court was bound. However, as will be seen by reference to the Appendix, the decisions of the Court of Appeal confirm that sense in which a previous decision of the House of Lords was generally understood. An offer may, of course, be expressly conditional on actual receipt of an acceptance within some definite time. In such case an acceptance which either wholly miscarried or arrived later than the specified time could not be effective."

We have seen that in general the contract dates from the acceptance; and though the acceptance be in form an acknowledgment of an existing agreement, yet this will not make the contract relate back to the date of the proposal, at all events not so as to affect the rights of third persons."

There is believed to be one positive exception in our law to the rule that the revocation of a proposal takes effect only when it is communicated to the other party. This exception is in the case of the

⁸⁸ Baggallay L. J. 4 Ex. Div. at 224.

⁸⁹ Baggallay L.J. 4 Ex. Div. at 228, the same limitation seems admitted by Thesiger L.J. at 218.

⁹⁰ [1892] 2 Ch. 27, 61 L. J. Ch. 373.

⁹¹ Delivery to a postman who is not authorized to receive letters for the post is not equivalent to posting. *Re London and Northern Bank* [1900] 1 Ch. 220; 69 L. J. Ch. 24.

⁹² 4 Ex. Div. at 234.

⁹³ See per Thesiger L.J. 4 Ex. Div. at 223, and per Bramwell L.J. at 238. Held ac. in Massachusetts (where, however, the general doctrine that an acceptance by post concludes the contract from the date of posting is not received); *Levens v. Browning* (1880) 130 Mass. 173. [According to Williston, Contracts, § 81, note 4, the only decision in the U. S. now contrary to the rule that acceptance by post concludes the contract is *McCulloch v. Eagle Insurance Co.*, 1 Pick. (Mass.) 278, and the learned author doubts whether this case would now be followed in Massachusetts.] There is now a tendency to hold that even in one-sided communications by letter the rights of parties are fixed at the date of posting: see *Alexander v. Steinhardt Walker & Co.* [1903] 2 K. B. 208; 72 L. J. K. B. 490. [But see the comment of Lord Wright M. R. on this case in *Timpson's Executors v. Yerbury* [1936] 1 K. B. 645, 657-658.]

⁹⁴ *Felthouse v. Bindley* (1862-3), p. 22.

proposer dying before the proposal is accepted. This event is in itself a revocation, as it makes the proposed agreement impossible by removing one of the persons whose consent would make it.¹ There is no distinct authority to show whether notice to the other party is material or not; but in the analogous case of agency the death of the principal in our law, though not in Roman law, puts an end *ipso facto* to the agent's authority, without regard to the time when it becomes known either to the agent or to third parties.² It would hardly be possible not to follow the analogy of this doctrine. The Indian Contract Act makes the knowledge of the other party before acceptance a condition of the proposal being revoked by the proposer's death. As for insanity, which is treated in the same way by the Indian Act, that would not in general operate as a revocation by the law of England, for we shall see that the contract of a lunatic (not so found by inquisition) is only voidable even if his state of mind is known to the other party. But it has been said that "if a man becomes so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting."³

CERTAINTY OF ACCEPTANCE

The next rule is in principle an exceedingly simple one. It is that

"In order to convert a proposal into a promise the acceptance must be absolute and unqualified."

Moreover conduct which is relied on as constituting the acceptance of an offer must, no less than words relied on for the same purpose, be unambiguous and unconditional.⁴

For unless and until there is such acceptance on the one part of terms proposed on the other part, there is no expression of one and the same common intention of the parties, but at most expressions of the more or less different intentions of each party separately—in other words, proposals and counter-proposals. Simple and obvious as the rule is in itself, the application to a given set of facts is not always obvious, inasmuch as contracting parties often use loose and inexact language, even when their communications are in writing and on important matters. The question whether the language used on a particular occasion does or does not amount to an acceptance is wholly a question of construction, and generally though not

¹ Per Mellish L.J. in *Dickinson v. Dodds* (1876) 2 Ch. D. at 475; 45 L. J. Ch. 777.

² *Blades v. Free* (1829) 9 B. & C. 167; 32 R. R. 620; *Campanari v. Woodburn* (1854) 15 C. B. 400; 24 L. J. C. P. 13; 2 Kent. Comm. 646; D. 46, 3, de solut. et liberat. 32. The Indian Contract Act, s. 208, illust. (c), adopts the Roman rule. [In the United States, the death of either offeror or offeree appears to terminate the offer: Williston, *Contracts*, § 62; *Restatement of Contracts*, §§ 48-49.]

³ *Bramwell L.J. Drew v. Nunn* (1879) 4 Q. B. D. at 569; 48 L. J. Q. B. 591. [For American law, see Williston, *Contracts*, § 62, where the question of knowledge of either party of the other's insanity is treated as material.]

⁴ Indian Contract Act, s. 7, sub-s. 1.

⁵ *Warner v. Willington* (1856) 3 Drew. 523, 533; 25 L. J. Ch. 662; 106 R. R. 416.

necessarily the construction of a written instrument. The cases in which such questions have been decided are numerous,* and we shall here give by way of illustration only a selection of modern ones.

ACCEPTANCE INSUFFICIENT

In *Honeyman v. Marryat*,⁷ before the House of Lords, a proposal for a sale was accepted "subject to the terms of a contract being arranged" between the vendor's and purchaser's solicitors: this was clearly no contract. (Compare this with *Hussey v. Horne-Payne*,⁸ where Lord Cairns appears to have thought that the acceptance of an offer to sell land "subject to the title being approved by our solicitors" is not a qualified or conditional acceptance, but means only that the title must be investigated in the usual way: in other words, it expressed the conditions annexed by law to contracts of this class, that a good title shall be shown by the vendor). So *Chillingworth v. Esche* [1924] 1 Ch. 97; 93 L. J. Ch. 129. C. A., "subject to a proper contract to be prepared": *Raingold v. Bromley* [1931] 2 Ch. 307; 100 L. J. Ch. 337, "subject to the terms of a lease"; [*Berry, Ltd. v. Brighton and Sussex Building Society* [1939] 3 All E. R. 217, "subject to a lease to be drawn up by our clients' solicitors"].

In *Appleby v. Johnson*,⁹ the plaintiff wrote to the defendant, a calico-printer, and offered his services as salesman on certain terms, among which was this: "a list of the merchants to be regularly called on by me to be made." The defendant wrote in answer: "Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; but I think we are quite agreed on all. We shall, therefore, expect you on Monday. (Signed) --J. Appleby --P.S.--I have made a list of customers, which we can consider together." It was held that on the whole, and especially having regard to the postscript, which left an important term open to discussion, there was no complete contract. So *Lockett v. Norman-Wright* [1925] Ch. 56; 94 L. J. Ch. 123, "subject to suitable agreements being arranged between your solicitors and mine."

In *Crossley v. Maycock*,¹⁰ an offer to buy certain land was accepted, but with reference to special conditions of sale not before known to the intending purchaser. Held only a conditional acceptance.

In *Lloyd v. Nowell*,¹¹ an agreement "subject to the preparation by my solicitor and completion of a formal contract" was held (1) to exclude the formation of a binding agreement; (2) not to be a condition which the vendor could waive as being only for his benefit. An offer "subject to title and contract" signifies refusal to be bound without a formal contract in writing, and approval of a draft will not do: *Coope v. Ridout*.¹²

* For collected authorities see (*inter alia*) Fry on Specific Performance, Part II. Ch. II. (1857) 6 H. L. C. 112; 26 L. J. Ch. 619, by Lord Wensleydale. The case was not argued, no one appearing for the appellant.

⁷ (1879) 4 App. Ca. 311, 322; 48 L. J. Ch. 846. *Contra* Maughan J. in *Curtis Moffat, Ltd. v. Wheeler* [1929] 2 Ch. 221, 234; 98 L. J. Ch. 374, preferring the opinion of the C. A. [Maughan J.'s view was accepted by Farwell J. in *Caney v. Leith* [1937] 2 All E. R. 532, 537, 538.]

⁸ (1874) L. R. 9 C. P. 158; 43 L. J. C. P. 146.

⁹ (1874) L. R. 18 Eq. 180; 43 L. J. Ch. 379, followed in *Jones v. Daniel* [1894] 2 Ch. 392; 63 L. J. Ch. 562.

¹⁰ [1895] 2 Ch. 744; 64 L. J. Ch. 744. [See, too, *Spottiswoode, Ballantyne & Co., Ltd. v. Doreen Appliances, Ltd.* [1942] 2 All E. R. 65.]

¹¹ [1921] 1 Ch. 291; 90 L. J. Ch. 61. C. A. *North v. Percival* (1898) 2 Ch. 128; 67 L. J. Ch. 321, is wrong, see per Parker J. *Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch. 284; 81 L. J. Ch. 184, and Russell J. and C. A. *Rosdale v. Denny* [1921] 1 Ch. 57, where authorities are reviewed.

In *Stanley v. Dowdeswell*¹² an answer in this form: "I have decided on taking No. 22, Belgrave Road, and have spoken to my agent, Mr. C., who will arrange matters with you," was held insufficient to make a contract, as not being complete and unqualified, assuming (which was doubtful) that the letter of which it was part did otherwise sufficiently refer to the terms of the proposal.

A. telegraphs to B.: "Will you sell us Whiteacre? Telegraph lowest cash price, answer paid." B. telegraphs in reply: "Lowest price for Whiteacre 900*l*." This is an answer only to the second question asked, and does not amount to an offer to sell, but only to a statement that an offer below 900*l*. will not be considered, and therefore a telegram from A. purporting to agree to the purchase at 900*l*. is itself only an offer.¹³

Where a seller undertook to accept the highest net money tender made by either of two competitors for the purchase, and one of them offered such sum as would exceed by 200*l*. the sum (unknown) which might be offered by the other, this was held no acceptance of the seller's terms, and incapable of constituting a contract.¹⁴

[In *Bishop & Baxter, Ltd. v. Anglo-Eastern Trading Co., Ltd.*,¹⁵ sellers of goods accepted an order from prospective buyers "subject to war clause." As there are many forms of "war clauses" and there was no evidence that the parties had selected any particular one of them, it was held that there was no acceptance in law.]

ACCEPTANCE SUFFICIENT

In *Filby v. Hounsell*¹⁶ an acceptance by a purchaser "subject to contract as agreed," i.e., a form set out on the vendor's own conditions of sale, was held without difficulty to be absolute.

An acceptance may be complete though it expresses dissatisfaction at some of the terms, if the dissatisfaction stops short of *dissent*, so that the whole thing may be described as a "grumbling assent."¹⁷

Again an acceptance is of course not made conditional by adding words that in truth make no difference; as where the addition is simply immaterial,¹⁸ or a mere formal memorandum is enclosed for signature, but not shown to contain any new term.¹⁹ And further, if the person answering an unambiguous proposal accepts it with the addition of ambiguous words, which are capable of being construed consistently with the rest of the document and so as to leave the acceptance absolute, they will if possible be so construed.²⁰

Again, the unconditional acceptance of a proposal is not deprived of its effect by the existence of a misunderstanding between the parties in the construction of collateral terms which are not part of the agreement itself.²¹

¹² (1874) 1 L. R. 10 C. P. 102. Cp. *Smith v. Webster* (1876) 3 Ch. D. 49; 45 L. J. Ch. 528.

¹³ *Harvey v. Facey* (J. C.) [1893] A. C. 552; 62 L. J. P. C. 127. This case does not seem to be generally approved. See Mr. Justice Russell's (of Ontario) critical note, 1 Canada Bar Rev. 398 (May, 1923). [Williston, Contracts, 57, note, also criticizes the decision, although he gives several American cases which exhibit just as much unreasonableness of interpretation.]

¹⁴ *South Hetton Coal Co. v. Haswell, &c. Coal Co.* [1898] 1 Ch. 465; 67 L. J. Ch. 238. C. A. [1944] 1 K. B. 12.]

¹⁵ [1896] 2 Ch. 737; 65 L. J. Ch. 852.

¹⁷ *Joyce v. Swan* (1864) 17 C. B. N. S. 84; cp. per Lord St. Leonards, 6 H. L. C. 277-8 (in a dissenting judgment).

¹⁸ *Clive v. Beaumont* (1847) 1 De G. & S. 397; 75 R. R. 144. [Distinguished in *Neale v. Merrett* (1930) 70 Law Journal 95.]

¹⁹ *Gibbins v. N. E. Metrop. Asylum District* (1847) 11 Beav. 1; 83 R. R. 101.

²⁰ *English and Foreign Credit Co. v. Arduin* (1870-1) L. R. 5 H. L. 64, per Lord Westbury, at 79; 40 L. J. Ex. 108.

²¹ *Baines v. Woodfall* (1859) 6 C. B. N. S. 657; 28 L. J. C. P. 338. The facts unfortunately do not admit of abridgment.

An acceptance on condition may be absolute if expressed in a manner which estops the acceptor from denying that the condition has been performed, or that he has waived its performance.²² A formal acceptance of an alleged proposal may estop the acceptor from denying that any such proposal was in fact made, at any rate if he has taken any benefit under the expressed agreement.²³

One further caution is needed. All rules about the formation and interpretation of contracts are subject to the implied proviso, "unless a contrary intention of the parties appears." And it may happen that though the parties are in fact agreed upon the terms—in other words, though there has been a proposal sufficiently accepted to satisfy the general rule—yet they do not mean the agreement to be binding in law till it is put into writing or into a formal writing. If such be the understanding between them, they are not to be sooner bound against both their wills. "If to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."²⁴ Whether such is in truth the understanding is a question which depends on the circumstances of each particular case; if the evidence of an agreement consists of written documents, it is a question of construction (not subject to any fixed rule or presumption) whether the expressed agreement is final.²⁵ For this purpose the whole of a continuous correspondence must be looked at, although part of it, standing alone, might appear to constitute a complete contract.²⁶ But this does not mean that a complete acceptance, including all the terms agreed on down to its date, can be undone by further correspondence short of a new agreement.²⁷

It is not to be supposed, "because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made; but the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement."²⁸ Still more is this the case if the first record of the terms agreed upon is in so many words expressed to be "subject to the preparation and approval of a formal contract":²⁹ or where a certain act, such as payment of the first premium of insurance, is expressly mentioned to fix the commencement of the contract.³⁰

²² *Roberts v. Security Co.* [1897] 1 Q. B. 111; 66 L. J. Q. B. 119, C. A., but *qu.* as to the actual decision there, see *Equitable Fire and Accident Office v. The Ching Wo Hong* [1907] A. C. 96, 101; 76 L. J. P. C. 31.

²³ *Pearl Life Assurance Co. v. Johnson* [1909] 2 K. B. 288; 78 L. J. K. B. 777.

²⁴ *Chinnock v. Marchioness of Ely* (1865) 4 D. J. S. 638, 646.

²⁵ *Rassiter v. Muller* (1878) 3 App. Ca. 1124, 1152; 48 L. J. Ch. 10.

²⁶ *Hussey v. Horne-Payne* (1879) 4 App. Ca. 311; 48 L. J. Ch. 846.

²⁷ *Perry v. Suffields* [1916] 2 Ch. 187; 85 L. J. Ch. 460, C. A.

²⁸ *Ridgway v. Wharton* (1856-7) 6 H. L. C. 238, 264, 268, per Lord Cranworth C., and see per Lord Wensleydale at 305-6, 27 L. J. Ch. 46.

²⁹ *Winn v. Bull* (1877) 7 Ch. D. 29; *Chillingworth v. Eschu* [1924] 1 Ch. 97; 93 L. J. Ch. 199, C. A.

³⁰ *Gunning v. Farquhar* (1886) 16 Q. B. Div. 727; 55 L. J. Q. B. 225.

But again: "it is settled law that a contract may be made by letters, and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain."¹¹ And in *Brogden v. Metropolitan Ry. Co.*,¹² the House of Lords held that the conduct of the parties, who in fact dealt for some time on the terms of a draft agreement which had never been formally executed, was inexplicable on any other supposition than that of an actual though informal consent to a contract upon those terms.

The tendency of recent authorities is to discourage all attempts to lay down any fixed rule or canon as governing these cases. The question may often be made clearer by putting it in this way—whether there is in the particular case a final consent of the parties such that no new term or variation can be introduced in the formal document to be prepared.¹³ But clear requirement of a formal contract is not dispensed with by the fact, if it be so, that all the terms are agreed.¹⁴

CERTAINTY OF TERMS

An agreement is not a contract unless its terms are certain or capable of being made certain.

For the Court cannot enforce an agreement without knowing what the agreement is. Such knowledge can be derived only from the manner in which the parties have expressed their intention.¹⁵ It is then business to find such expressions as will convey their meaning with reasonable certainty to a reasonable man conversant with affairs of the kind in which the contract is made. The question then is whether such certainty be present in the particular case. One or two instances will serve as well as many. A promise by the buyer of a horse that if the horse is lucky to him, he will give 5*l.* more, or the buying of another horse is 'much too loose and vague to be considered in a court of law.'¹⁶ "The buying of another horse" is a term to which the Court cannot assign any definite meaning.¹⁷ An agreement to sell an estate, reserving "the necessary land for making a railway," is too vague.¹⁸ An agreement to take a house "if put into thorough repair," and if the drawing-rooms were "handsomely decorated according to the present style," has been dismissed as too uncertain to be specifically enforced.¹⁹

¹¹ James L. J. in *Bonnycastle v. Jenkins* (1878) 8 Ch. Div. 70, 73, 47 L. J. Ch. 758; *Bolton v. Lambert* (1889) 41 Ch. Div. 295, 305.

¹² (1877) 2 App. Ca. 666; see Lord Cairns's opinion.

¹³ Lord Blackburn, 3 App. Ca. at 1151. In addition to cases already cited, see *Lewis v. Brass* (1877) 3 Q. B. Div. 667; *Kingston-upon-Hull (Governors, &c.) v. Petch* (1854) 10 Ex. 610; 102 R. R. 728.

¹⁴ *Coope v. Ridout* [1921] 1 Ch. 291; 90 L. J. Ch. 61, C. A.

¹⁵ Cp. the remarks and references of McCordie J. [1918] 2 K. B. at 262.

¹⁶ *Guthrie v. Lynn* (1831) 2 B. & Ad. 232.

¹⁷ *Pearce v. Watts* (1875) L. R. 20 Eq. 492; 44 L. J. Ch. 492.

¹⁸ *Taylor v. Portington* (1855) 7 D. M. & G. 328; 109 R. R. 147. This of course did not decide that an action for damages would not lie.

[An agreement to let a house "for the duration of the war" was held in *Lace v. Chantler*³⁸ not to create a valid lease, because the period was too uncertain; but the law on this point was altered by the Validation of War-time Leases Act, 1944 (7 and 8 Geo. 6, c.34), the effect of which is, in general, to validate such tenancies, whether the agreements creating them were made before or after the passing of the Act.] A statement by a parent to his daughter's future husband that she will have "a share" of his property cannot be construed as a promise of an equal share.³⁹ On the other hand an agreement to execute a deed of separation containing "usual covenants" is too vague to be enforced.⁴⁰

[It has been said that "there cannot be a contract to make a contract," but this is a misleading epigram, for it is inaccurate in so far as it goes beyond the rule that, if parties to an agreement leave essential terms in it undetermined and therefore to be settled by a subsequent contract, their agreement is not an enforceable contract. On the other hand, as Lord Wright said in *Hillas and Co., Ltd. v. Arcos, Ltd.*,⁴¹ "A contract *de praesenti* to enter into what, in law, is an enforceable contract, is simply that enforceable contract, and no more and no less: and if what may not very accurately be called the second contract is not to take effect till some future date but is otherwise an enforceable contract, the position is as in the preceding illustration, save that the operation of the contract is postponed. But in each case there is *eo instanti* a complete obligation. If, however, what is meant is that the parties agree to negotiate in the hope of effecting a valid agreement, the position is different. There is then no bargain except to negotiate. . . . yet even then, in strict theory, there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a jury think that the opportunity to negotiate was of some appreciable value to the injured party." Moreover, quite apart from these cases, the Courts will implement the unspecified details of a contract on the main points of which the parties are unquestionably agreed. Documents embodying a business agreement are often couched in terms which are intelligible to the parties but which appear to be vague to persons unfamiliar with the business. The test for ascertaining whether or not the agreement constitutes a contract is best stated as follows by Lord Wright in the case mentioned above.⁴²

"It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the Court should seek to

³⁸ [1944] 1 K. B. 368.]

³⁹ *Re Fickus* [1900] 1 Ch. 331; 69 L. J. Ch. 161

⁴¹ *Hart v. Hart* (1881) 18 Ch. D. 670, 684; 50 L. J. Ch. 697.

⁴² [(1932) 147 L. T. 503, 515.]

⁴³ [*Ibid.* 514.]

apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. The maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted by the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain. . . . Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties can be extracted."

In the case from which this passage is cited, an agreement for the sale during 1930 of Russian softwood timber contained a clause conferring an option on the buyers to contract with the sellers for the purchase of further timber to be delivered during 1931. The option clause said nothing of the kinds, sizes or qualities of the timber to be supplied nor of the dates and ports of shipment and discharge. The buyers exercised the option and the House of Lords held that the clause authorizing it was binding and was not merely an agreement to make an agreement. The points left uncertain in it could all be made certain by reference to other clauses in the contract and to the surrounding circumstances. *Certum est quod certum reddi potest*.

The House distinguished its earlier decision in *May & Butcher, Ltd. v. R.*⁴⁸ There, the Government agreed to sell a specified stock of "tentage" to X., the prices and times of payment to be fixed from time to time between the parties as the quantities of tentage became available. The parties were unable to agree, as to the prices. It was held that this was merely an agreement to make an agreement and therefore was not binding. Nor did the Sale of Goods Act, 1893, (56 and 57 Vict. c.71), s. 8, help the parties. It provides that: "(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. (2) Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price." It was contended that the clause as to a reasonable price applied, but the House held that this clause can be invoked only where the contract is silent as to the price, and here a mode of determining it had been mentioned.

⁴⁸ [(1929) ; reported in [1934] 2 K. B. 17.]

Both these cases were considered by the Court of Appeal in *Foley v. Classique Coaches, Ltd.*⁴⁴ There, A. agreed to sell to B. & Co., motor-coach proprietors, a plot of land. The agreement was made subject to B. & Co. entering into another agreement to buy from A. all the petrol required for the business of B. & Co., "at a price to be agreed by the parties in writing and from time to time." Disputes were to be referred to arbitration. Both agreements were concluded, and for three years B. & Co. purchased their petrol from A. They then refused to take any more. It was held that there was a binding contract, that the arbitration clause included disputes as to the prices of the petrol and that a term must be implied that the petrol should be sold at a reasonable price. Several points of distinction were taken between this case and *May & Butcher, Ltd. v. R.* In particular, it may be inferred from the judgments that in *Foley's* case, the application of the Sale of Goods Act, s. 8, was this. The parties were held to have agreed to refer disputes as to price to arbitration. Therefore, sub-s. (1) of s. 8 applied, and not sub-s (2) (*supra*); the price was "left to be fixed in manner thereby agreed." When, therefore, the Court of Appeal held that a reasonable price must be implied they were really laying down a guide for the arbitrator and were not applying sub-s (2) at all.

No doubt the principles that (1) if parties leave essential terms in an agreement to be determined in a subsequent contract, the agreement is not a contract, but (ii) the Court may give effect to details unstated in a genuine contract, must occasionally be in close competition in their application to particular cases; but to press for any statement of these principles more exact than Lord Wright's (*supra*) is perilously near a demand for mechanization of all business contracts.]

AMBIGUITY OF TERMS

It may happen, though for obvious reasons not often, that the terms of an apparently complete agreement are ambiguous and differently understood by the parties, so that the offer which the acceptor intended to accept was not that which the proposer intended to make. Unless one party is estopped from denying that he agreed in the same sense as the other there is no contract. We follow the common practice in dealing with these unusual cases under the head of Mistake: see Ch. IX. Part ii.

⁴⁴ [1934] 2 K. B. 1.]

⁴⁵ [Other aspects of these cases are treated in 49 L. Q. R. (1933), 316—319; 50 L. Q. R. (1935), 277—279. The later decisions in *British Homophone, Ltd. v. Kunz, & Co. Ltd.* (1935) 152 L. T. 589; *Way v. Latilla* [1937] 3 All E. R. 759, H. L., and *Scammell, & Co., Ltd. v. Ouston* [1941] A. C. 251, add nothing to the law, except that *Way's* case shows that evidence insufficient to establish a contract may nevertheless be relevant as a guide for determining what is recoverable under a *quantum meruit*; see 53 L. Q. R. (1937), 460—461.]

ILLUSORY PROMISES

To this head those cases are perhaps best referred in which the promise is illusory, being dependent on a condition which in fact reserves an unlimited option to the promisor. "Nulla promissio potest consistere, quae ex voluntate promittentis statum capit."⁴¹ Thus where a committee had resolved that for certain services "such remuneration be made as shall be deemed right," this gave no right of action to the person who had performed the services: for the committee alone were to judge whether any or what recompense was right.⁴² Moreover a promise of this kind, though it creates no enforceable contract, is so far effectual as to exclude the promisee from falling back on any contract to pay a reasonable remuneration which would be inferred from the transaction if there were no express agreement at all. In *Roberts v. Smith*⁴³ there was an agreement between A. and B. that B. should perform certain services, and that in one event A. should pay B. a certain salary, but that in another event A. should pay B. whatever A. might think reasonable. That other event having happened, the Court held there was no contract which B. could enforce. Services had indeed been rendered, and of the sort for which people usually are paid and expect to be paid; so that in the absence of express agreement there would have been a good cause of action for reasonable reward. But here B. had expressly assented to take whatever A. should think reasonable (which might be nothing), and had thus precluded himself from claiming to have whatever a jury should think reasonable. It would not be safe, however, to infer from this case that under no circumstances whatever can a promise to give what the promisor shall think reasonable amount to a promise to give a reasonable reward, or at all events something which can be found as a fact not to be illusory. The circumstances of each case (or in a written instrument the context) must be looked to for the real meaning of the parties: and "I leave it to you" may well mean in particular circumstances (as in various small matters it notoriously does), "I expect what is reasonable and usual, and I leave it to you to find out what that is," or, "I expect what is reasonable, and am content to take your estimate (assuming that it will be made in good faith and not illusory) as that of a reasonable man."⁴⁴ Again, there may be a good promise conditional on the promisor being satisfied with the work done for

⁴¹ D. 45.1 de verb. obl. 108, § 1. [In American law, illusory promises are not binding: Williston, Contracts, 4, and references in Note 5 to that page. It is pointed out in § 49 that part performance of an indefinite promise may create a binding obligation, and also that, even without performance on either side, the original indefiniteness may sometimes be cured by a subsequent definition of the part performance.]

⁴² *Taylor v. Brown* (1813) 1 M. & S. 290; 21 R. R. 831.

⁴³ (1859) 4 H. & N. 315; 28 L. J. Ex. 164; 113 R. R. 462.

⁴⁴ Such a case (if it can be supported, see the remarks on it in *Roberts v. Smith*, and per Buckley L. J. in *Broome v. Speak* [1903] 1 Ch. 586, 599) was *Bryant v. Flight* (1834) 5 M. & W. 114, where the majority of the Court held that it was for the jury to ascertain how much the defendant, acting *bona fide*, would, or ought to have awarded.

him, or with the proof of a fact. That is not an arbitrary power but a discretion to be exercised in good faith."

Another somewhat curious case of an illusory promise (though mixed up to some extent with other doctrines) is *Moorhouse v. Colvin*.²¹ There a testator, having made a will by which he left a considerable legacy to his daughter, wrote a letter in which he said after mentioning her other expectations, "nor will that be all: she is and shall be noticed in my will, but to what further amount I cannot precisely say." The legacy was afterwards revoked. It was contended on behalf of the daughter's husband, to whom the letter had with the testator's authority been communicated before the marriage, that there was a contract binding the testator's estate to the extent of the legacy given by the will as it stood at the date of the letter. But it was held that the testator's language expressed nothing more than a vague intention, although it would have been binding had it referred to the specific sum then standing in the will, so as to fix that sum as a minimum to be expected at all events.

A promise to enter into a certain kind of agreement with a third person is obviously dependent for its performance on the will of that person, but is not thereby rendered so uncertain as not to afford a cause of action as between the parties to it. The consent of a third person is not more uncertain than many other things which parties may and do take on themselves to warrant.²²

ABSURD PROMISES

A promise might conceivably be illusory in another way, namely if on the face of its terms it were so absurd that it could not be taken as the expression of any serious dealing. Extreme cases of fraudulent and oppressive agreements may be said, perhaps, to come near this as a limit. But for such cases there are special and more certain rules. We do not know that an agreement has ever been sued on and held void on the sole ground of being irrational. Questions as to the possibility of performance are for all practical purposes questions of construction, as we shall see later.

REPUGNANCY IN LAW

If a promise obviously purported to aim at a result incompatible with the law of property, such as the sale of something not alienable, or the creation of an estate not known to English conveyancing, it would fall within the same class. But this does not occur in fact. What does often happen is that it is not obvious even to learned persons whether a given disposition of property (and

²⁰ *Andrews v. Belfield* (1857) 2 C. B. N. S. 779; 109 R. R. 885 (goods); *Braunstein v. Accidental Death Insce. Co.* (1861) 1 B. & S. 782; 124 R. R. 725 (proof of claim).

²¹ (1851) 15 Beav. 341, 348, affd. by L.J.J. 21 L. J. Ch. 782; 92 R. R. 452, 458.

²² *Foster v. Wheeler* (1888) 38 Ch. Div. 130; 57 L. J. Ch. 149, 871.

consequently an agreement to make it) will or will not stand with some of the more refined rules in our law, such as the rule against remoteness. In such cases there may be a double question, first of construing the disposition whose validity is in doubt, and then of interpreting the rule and either or both of them may be difficult. These difficulties are outside our present scope.

It is possible however, for slips in drafting to produce such legally absurd results as purporting to make a man covenant with himself.¹¹ Mishaps of this kind may be remediable by the jurisdiction to rectify instruments (of which we shall speak elsewhere) or even by a context sufficiently manifesting the true intention.¹²

ACCEPTANCE OF CONDITIONS ANNEXED BY REFERENCE

The distinction between an actual offer to unascertained persons which may become a promise when accepted by one of them according to its terms and an announcement of willingness and readiness to do business of a certain kind on specified terms, which is only an invitation of offers, has already been pointed out. Where an invitation of offers leads to business, the terms of any resulting agreement are often determined by reference to the terms of the invitation. It constantly happens indeed that these terms leave no room for bargaining on details and contain the whole terms of the kind of agreement contemplated. Railway time tables, announcements of shipping companies and the like are common examples both as to transport of travellers and as to other incidental services such as taking charge of deposited baggage or other goods. The terms thus annexed by way of reference may contain limitations of the announcer's liability for safe carriage, custody and so forth, and it is now notorious that they almost always do. Questions may arise and often do whether such special terms have in fact been sufficiently brought to the notice of the passenger depositor or other person acting on the general invitation issued by the railway or shipping company or other like undertaker, so that by so acting he must be deemed to have accepted and to be bound by those terms. In dealing with cases of this class the general principles governing the formation of contracts have to be steadily borne in mind.

We have already seen that when the subject was new one or two judges were disposed to regard time tables and the like as actual offers of a contract to be completed by acting on them, but that the results of so holding would be contrary to common sense. No countenance is given to any such opinion by the special authorities now to be referred to. When a railway passenger (to take the

¹¹ A promise by A. to pay A. and B. jointly is no less repugnant than if it were to pay himself alone, *Faulkner v. Louv* (1848) 2 Ex. 595, 76 R. R. 697, and see per Bowen L. J. *Re Hoyle* [1893] 1 Ch. 84, 99.

¹² *Fitch v. Jones* (1855) 5 P. & B. 238, 24 L. J. Q. B. 293, 103 R. R. 455 (the first point.)

simplest example) asks for a ticket, he is not concluding a contract but at most offering to be carried by the company on the terms to which he knows, or as a reasonable man should know, the company will agree. But it appears on reflection that he is not even making an offer but only opening communications leading to an offer and acceptance. The ticket is issued in regular course only against payment, so that the railway company (or other purveyor of services to the public in a like position, as the case may be) makes an offer by tendering the ticket, and the contract is formed only by acceptance of the ticket immediately after payment of the fare. This is the view taken, though not always explicitly stated, in the line, by this time numerous, of authorities on such cases.¹¹ Thus detailed analysis of the process justifies the summary view of lay common sense, which surely is that the party offering terms to be accepted is the railway company or other public undertaker.

Now let C. be the company (or other undertaker of public service) and P. the passenger (or other person in like situation). It is a question of fact, in case of dispute, what was the offer which P. was reasonably entitled to accept as being C.'s offer? By undertaking to carry him to M. for the price of *n* shillings C. is subject, by the common law or the terms of its incorporation, or both, to certain further duties. If C. is not willing to be liable for so much, P. must be so informed, and his general acceptance of C.'s offer will include acceptance of the reduced responsibility. The question what information of any such special conditions is usual and sufficient could not be left at large to be discussed on every occasion, and a scheme of rules and presumptions has been laid down which, notwithstanding some adverse criticism, seems on the whole to be in accordance with convenience and common sense.¹² They have, of course, nothing to do with questions as to the effect of terms which were in fact fully known and accepted. The line of authority goes back to the last quarter of the nineteenth century, and the results may now be shortly stated without dwelling on

¹¹ See especially per Swift J. *Nunan v. Southern R. Co.* [1923] 2 K. B. at 707 (the case itself was not on a contract) approved by Lord Hanworth M.R. *Thompson v. L. M. & S. R. Co.* [1930] 1 K. B. 41, 47. Moreover the other view would require a much more complicated theory to produce reasonable results. But it would be useless to pursue this.

¹² See an ingenious note by Prof. Hughes in L. Q. R. Oct. 1931 (xlvii, 459) with most of which I am unable to agree. [The author does not state any reason for disagreement. With all deference to him, it is submitted that in some circumstances the law bears harshly upon railway passengers. This is particularly so where, as commonly happens nowadays, railway companies exclude themselves from liability for accidents of any sort to travellers on excursion trains. A distinction ought to be taken between unwitting carelessness such as failure to warn a passenger that a train is not quite level with a platform and recklessness such as deliberately putting excursion passengers in an old carriage known to be unsafe. It must, however, be admitted that there is direct authority against any such distinction: *McCawley v. Furness R.* (1872) L. R. 8 Q. B. 57; *Gallin v. L. & N. W. R.* (1875) L. R. 10 Q. B. 212; see 55 L. Q. R. (1939), 518—520. A learned reviewer of the 10th ed. of this book finds it difficult to reconcile the "ticket" cases with *Carlisle Banking Co. v. Bragg* [1911] 1 K. B. 489 (14 Canadian Bar Review (1936) 784). But that case is not *in pari materia*].

detail. We use the letter C to stand for the party tendering the conditions and P for the party whom C. seeks to hold to them.

P. is entitled to understand that conditions offered by reference are not manifestly irrelevant or unreasonable." P. is also entitled to reasonable notice, according to the nature and circumstances of the case, that C. is willing to undertake the service offered only on special terms."

If P. having such notice, accepts C.'s offer of service, he cannot be heard to deny that he knew the offer to be qualified by reference to such terms."

Whether P. had reasonable notice is a question of fact."

But this is subject to the universal rule that there is no issuable question of fact without some evidence on which the question is reasonably open, and for this purpose P. must be treated as having the faculties and intelligence of a normal man. He cannot plead, in face of a plainly legible reference to conditions, that he is illiterate or blind."

Generally acceptance of a ticket or other common form document plainly showing on its face" (or, if it does not consist of a face and a back, by its general make up) that there are special conditions and identifying them for reference is deemed to be acceptance of the conditions. It is not material that their full text is not immediately accessible,* nor whether P. had any reason beforehand to expect that C.'s offer would be subject to any special conditions."

In practice it is generally correct to put the question of fact in this form: Did C. do all that was reasonably necessary to give notice to P.?"

If P. travels with a ticket or pass for which not he but Q. paid, and makes no inquiry as to the terms, he cannot disregard the terms made by Q. His only claim against C. is as Q.'s principal

* Per Brav J. *Gibaud v. G. F. R. Co.* [1920] 2 K. B. 689 at 699, 901. J. K. B. 194, 535, affd. [1921] 2 K. B. 426: the only question pursued before the C. A. was whether the goods had been put in a proper place of custody. Lawrence J. *Thompson v. L. M. & S. R. Co.* [1930] 1 K. B. 41, 53, 98 L. J. K. B. 615. [A condition may exclude all liability. *Beaumont-Thomas v. Blue Star Line* [1939] 55 T. L. R. 852. Cf. *Chapellon v. Barry L. D. Co.* [1940] 1 K. B. 532, 109 L. J. K. B. 213.]

* Per Lord Haldane. *Hood v. Anchor Line* [1918] A. C. 837, 844, 845. *Richardson v. Routmire* [1894] A. C. 217, 63 L. J. Q. B. 283. The curious reader may compare Ulpien's remarks (for another purpose) on the sufficiency of public notice. D. 14, 3 *de inst. act.* 11 §§ 2, 3.

* *Thompson v. L. M. & S. R. Co.* note 66. [*I. Estrange v. Graucol, Ltd.* [1934] 2 K. B. 394, 103 L. J. K. B. 730.]

* A statement or reference not so indicated will not be good notice. *Henderson v. Stevenson* (1875) L. R. 2 H. L. 54, 470. Some of the observations in the opinions other than Lord Cairns's cannot now be relied on.

* *Burke v. S. F. R. Co.* [1879] 5 C. P. D. 1.

* *Penton v. Southern R.* [1931] 2 K. B. 103, 100 L. J. K. B. 228 (cheap day ticket issued in ordinary course without passenger's request for a cheap ticket). [The principle of the decisions on railway tickets has been applied to the duty of an occupier of premises towards an invitee in the law of tort, a notice-board excluding liability of the occupier for defects in the premises must be easily legible, *The Humarut* [1944] p. 28.]

and Q. must be regarded for this purpose as his agent authorized to agree to any reasonable terms."

It may be useful to note that the English authorities have been discussed and followed in Scotland."

In 1883 the earlier decisions on this topic (not all of which we have thought it needful to cite in the present state of the authorities) were well reviewed in the judgment of a Divisional Court delivered by Stephen J. The importance of the document offered being in a common form seems to have been noticed here for the first time."

The ingenious writer already cited (note *, p. 41) puts as a puzzle the case of a ticket for a wrong destination being issued by misunderstanding or accident, a case, it is submitted, of another kind and of no real difficulty. Clearly, the taker will suppose, having no reason to doubt, that he is accepting the offer which he invited; he cannot check the correctness of the ticket before receiving it into his own possession. The result is that the parties never consent to the same terms and no agreement is formed. Cases of this class are dealt with later under the head of Mistake, Chap. IX, part ii. There is of course no ground for attributing any magical operation to the delivery of a ticket; we have only to apply the elementary rules of offer and acceptance.

SPECIAL RULES AS TO PROMISES BY DEED

It has already been pointed out that the ordinary rules of proposal and acceptance do not apply to promises embodied in a deed. It is established by a series of authorities which appear to be confirmed by the *ratio decidendi* of *Xenos v. Wickham*" in the House of Lords, that a promise so made is at once operative without

⁶³ *Grand Trunk R. Co. of Canada v. Robinson* [1915] A. C. 740, 84 L. J. P. C.; neither can he repudiate the contract and sue as for the breach of an independent common law duty.

⁶⁴ *Gray v. I. & N. E. R. Co.* [1930] S. C. 989. [A learned reviewer of the 10th ed. points out that the same principles were applied in the earlier cases of *Williamson v. North of Scotland Navigation Co.* [1916] S. C. 554, *Lyons v. Caledonian R.* [1909] S. C. 1185, and *Highland R. v. Menzies* (1878) 5 R. 887. He also notes that *Hood v. Anchor Line, Ltd.* [1918] A. C. 837 (note *) was a Scottish appeal to the H. L. (48 Juridical Review (1936) 395).]

⁶⁵ *Watkins v. Rymill* (1884) 10 Q. B. D. 178, 52 L. J. Q. B. 121. The decision of the C. A. in *Parker v. S. E. R. Co.* (1877) 2 C. P. Div. 416; 46 L. J. C. P. 768, which for a time was a leading case, is completely covered by the recent authorities. For recent particular applications, see *Roe v. R. A. Naylor* [1917] 1 K. B. 719; 86 L. J. K. B. 771 (conditions in sold note); *The Luna* [1920] P. 22; 89 L. J. P. 109 (ship's master signing conditions of towage).

⁶⁶ (1866) L. R. 2 H. L. 296, 36 L. J. C. P. 313. The previous cases were *Doe d. Garmons v. Knight* (1826) 5 B. & C. 671; 29 R. R. 355 (a mortgage); *Exton v. Scott* (1833) 6 Sim. 31; 28 R. R. 72 (the like); *Hall v. Palmer* (1844) 3 Hare, 532; 13 L. J. Ch. 352; 64 R. R. 399 (bond to secure annuity after obligor's death); *Fletcher v. Fletcher* (1844) 4 Hare, 67; 14 L. J. Ch. 66; 67 R. R. 6 (covenant for settlement to be made by executors). *Xenos v. Wickham* might have been decided on the ground that the company's execution of the policy was the acceptance of the plaintiffs' proposal, and the plaintiffs' broker was their agent to receive communications of the acceptance. But that ground is distinctly not relied upon in the opinions of the Lords: see L. R. 2 H. L. at 320, 323.

any question of acceptance ; and this because it derives its force not from anything passing between the parties, but from the promisor's—or, in the regular language of conveyancing, covenantor's—solemn admission that he is bound. Thus an obligation is created which whenever it comes to the other party's knowledge affords a cause of action without any other signification of his assent, and in the meanwhile is irrevocable. But if the promisee refuses his assent when the promise comes to his knowledge the contract is avoided.

“If A makes an obligation to B and delivers it to C to the use of B, this is the deed of A. presently; but if C. offers it to B., there B may refuse it *in pais*” (i.e. without formality). “and thereby the obligation will lose its force”⁴¹

⁴¹ *Butler and Baker's case* 1791 3 Co. Rep. 26, quoted by Blackburn J. 1 R. 2 H. L. at 312. “Obligation” here, as always in our older books, means the special form of deed otherwise, and now exclusively, called a bond. [In the United States, the decisions do not, in general, go so far as *Amon v. Widdha*. The Restatement of Contracts adopts the view of those authorities which require some act of relinquishment by the maker of the custody or control of the deed. § 402. see also Williston, Contracts § 211.]

2

CAPACITY OF PARTIES

ALL statements about legal capacities and duties are taken, unless the contrary be expressed, to be made with reference to "lawful men,"¹ citizens, that is, who are not in any manner unqualified or disqualified for the full exercise of a citizen's normal rights. There are several ways in which persons may be or become incapable, wholly or partially, of doing acts in the law, and among other things of becoming parties to a binding contract.² All persons must attain a certain age before they are admitted to full freedom of action and disposition of their property. This is but a necessary recognition of the actual conditions of man's life. The age of majority, however, has to be fixed at some point of time by positive law. By English law it is fixed at twenty-one years; and every one under that age is called an infant (Co. Lit. 171 b).

By the Common Law married women sustained, as incident to their new status, extensive loss of legal capacity, mitigated by modern statutes till, by an Act of 1935, the rule was wholly abrogated for the future. The old law, however, cannot yet be neglected.

Both men and women may lose their legal capacity, permanently or for a time, by an actual loss of reason. This we call insanity when it is the result of distinctly mental disease, intoxication when it is the transient effect of drink or narcotics. Similar consequences, again, may be attached by provisions of positive law to conviction for criminal offences. Deprivation of civil rights also may be, and has been in England in some particular cases, a substantive penalty, but it is not thus used in any part of our law now in practical operation.

On the other hand, the capacity of the "lawful man" receives a vast extension in its application, while it remains unaltered in kind, by the institution of agency. One man may empower another to perform acts in the law for him and acquire rights and duties on his behalf. By agency the individual's legal personality is multiplied in space, as by succession it is continued in time. The thing is now so familiar that it is not easy to realize its importance, or the magnitude of the step taken by legal theory and practice in its full recognition. We may be helped to this if we remember that in the classical Roman system there is no law of agency as we understand it. The slave, who did much of what is now done by free servants

¹ In the Latin it is "*legalis homo*," not "*vir*." Our medieval ancestors, not foreseeing the enfranchisement of women, wrote Latin better than they knew.

² [Cf. Salmond & Winfield, *Contracts*, § 134.]

and agents, was regarded as a mere instrument of acquisition for his owner, except in the special classes of cases in which either slaves or freemen might be in a position analogous, but not fully equivalent, to that of a modern agent. As between the principal and his agent, agency is a special kind of contract. But it differs from other kinds of contract in that its legal consequences are not exhausted by performance. Its object is not merely the doing of specified things, but the creation of new and active legal relations between the principal and third persons. Hence it may fitly have its place among the conditions of contract in general, though the mutual duties of principal and agent belong rather to the treatment of agency as a species of contract.

While the individual citizen's powers are thus extended by agency, a great increase of legal scope and safety is given to the conjoint action of many by their association in a corporate body or artificial person. The development of corporate action presupposes a developed law of agency, since a corporation can execute its intentions only through natural persons generally or specially authorized to act on its behalf. And as a corporation in virtue of its perpetual succession and freedom from all or most of the disabilities which may in fact or in law affect natural persons has powers exceeding those of a natural person, so those powers have to be defined and limited by rules of law, partly for the protection of the individual members of the corporation, partly in the interest of the public.

We proceed to deal with these topics in the order indicated, and first of the exceptions to the capacity of natural persons to bind themselves by contract.

PART I

1. INFANTS

An infant is not absolutely incapable of binding himself, but is, generally speaking, incapable of absolutely binding himself by contract.² His acts and contracts are voidable at his option, subject to certain statutory and other exceptions.

By the common law a contract made by an infant is generally voidable at the infant's option, such option to be exercised either before³ his attaining his majority or within a reasonable time afterwards.

Where the obligation is incident to an interest (or at all events to a beneficial interest) in property, it cannot be avoided while that interest is retained.

Some agreements are, exceptionally, not voidable but void.

By the Infants Relief Act, 1874 (37 and 38 Vict. c. 62), loans of money to infants, contracts for the sale to them of goods other than

² Stated in this form by *Haver J.* 14 Ir. C. L. Rep. at 356.

³ As to this, see p. 51.

necessaries, and accounts stated with them are absolutely void ; and no action can be brought on a ratification of any contract made during infancy.

On the other hand an infant is bound to pay a reasonable price for necessities sold and delivered to him ; where " necessities " mean goods suitable to his condition in life and his actual requirements at the time.*

An infant's express contract may be valid if it appears to the Court to be beneficial to the infant.

In certain other cases infants are or were enabled to make binding contracts by custom or statute.

An infant is not liable for a wrong arising out of or immediately connected with his contract, such as a fraudulent representation at the time of making the contract that he is of full age. But an infant who has represented himself as of full age is bound by payments made and acts done at his request and on the faith of such representations, and is liable to restore any advantage[†] he has obtained by such representations to the person from whom he has obtained it.

OF THE CONTRACTS OF INFANTS IN GENERAL AT COMMON LAW, AND AS AFFECTED BY THE ACT OF 1874

It was once commonly said that an agreement made by an infant if such that it cannot be for his benefit, is not merely voidable, but absolutely void—though in general his contracts are only voidable at his option. But this distinction is in itself unreasonable, and

* Sale of Goods Act, 1893, § 6 & 57 *Vict. c. 71, s. 2*. This confirms the opinion that an infant's obligation to pay for necessities is not created by agreement but imposed by law, in other words that there is not a true contract but a quasi-contract. See the observations of the Lords Justices in *Nash v. Inman*, [1908] 2 K. B. 1, 77 L. J. K. B. 626, and note thereon in L. Q. R. xxv, 237. [It cannot be regarded as settled that the basis of an infant's liability to pay for necessities is quasi-contract rather than contract. It is true that in *Nash v. Inman*, Fletcher-Moulton L. J. at 8 considered it to be quasi-contract but Buckley, L. J. had no doubt that it is contract. Later *dicta*, one way or the other carry the matter no farther than those in *Nash v. Inman*, in *Elkington & Co., Ltd. v. Amery* [1936] 2 All E. R. 86, 88, Greer L. J. was of opinion that *Nash v. Inman* decided that an infant cannot contract at all for necessary goods, but in *Doyle v. White City Stadium, Ltd.* [1935] 1 K. B. 110, 122–124, 104 L. J. K. B. 140, Lord Hanworth M.R. thought that he could. See, too, *Walter v. Everett* [1891] 2 Q. B. 369, 376–377. In *Pontypridd Union v. Drury* [1927] 1 K. B. 214, 220, 95 L. J. K. B. 1030 Scrutton L. J. said *obiter* that the old course of pleading in an action for the price of necessities did not imply a consensual contract, and he referred to the infant "not being able to contract". The question is considered at length in 38 L. Q. R. (1942) 82–95, where (at 93) a preference is expressed for the quasi-contractual view because it has the advantage of interpreting the Sale of Goods Act, 1893, s. 2, in a way which fits neatly, and consistently with the earlier law, the liability of the other persons mentioned in s. 2,—the lunatic and drunkard.]

† Not to repay a loan of money. *R. Leslie v. Sheill* [1914] 3 K. B. 607, 83 L. J. K. B. 1145, C. A.

‡ An infant's deed is generally voidable, *Litt. s. 259*, but it is said that if it is not such as to take effect "by the delivery of his own hand," it is void. *Perk. 12*; *Shepp Touch 232-3*, *Co. Lit. 31 b, s. 3*, *Burr. 1805*, 2 Dr. & W. 340. It is assumed in modern practice that an infant's sale or gift of personal chattels with actual delivery is good; *Taylor v. Johnston* (1880) 19 Ch. D. 603, 608. According to the old books it would seem to be voidable.

the weight of all modern authority is against it.⁸ The use of the word *void* proves nothing, for it is to be found in cases where there has never been any doubt that the contract is only voidable. And as applied to other subject matters it has been held to mean only *voidable* in formal instruments⁹ and even in Acts of Parliament.¹⁰

Actual decision is the only safe guide; and as early as 1813 it was clearly laid down in the Exchequer Chamber, as the general rule of law, that the contract of an infant may be avoided or not at his own option. The Court refused to recognize any variation of the rule as generally applicable to trading contracts.¹¹

There is nothing to set against this in any reported case of co-ordinate authority. Dicta in cases of inferior authority to the effect that trade contracts of infants are void (as distinct from voidable) could not prevail against a decision of the Exchequer Chamber even if they were necessary to the judgments in which they occur. Examination shows that they were superfluous in every case cited for the formerly current doctrine, but it seems needless to repeat what was said in earlier editions, as that doctrine is now, I believe, abandoned everywhere.

In *R v Lord*, indeed the following opinion was given by the Court of Queen's Bench on the conviction of a servant for unlawfully absenting himself from his master's employment:

"Among many objections one appears to us clearly fatal. He was an infant at the time of entering into the agreement which authorises the master to stop his wages when the steam engine is stopping working for any cause. An agreement to serve for wages may be for the infant's benefit" but an agreement which compels him to serve at all times during the term but leaves the master free to stop his work and his wages whenever he chooses to do so cannot be considered as beneficial to the servant. It is inequitable and wholly void. The conviction must be quashed."¹²

But this is laxity of language at most. The Court decided only that the agreement was not enforceable against the infant, this does not mean that if the master had arbitrarily refused to pay wages for the work actually done the infant could not have sued him on the agreement. Again, it is said that a lease made by an infant without reservation of any rent (or even not reserving the best rent) is absolutely void. But this opinion was disapproved by Lord Mansfield whose judgment Lord St Leonards adopted as

⁸ [The earlier history is given in Salmond & Winfield, *Contracts*, 448-450.]

⁹ *Lincoln College's case* 1595, 3 Co. Rep. 59 b.; *Doed Bryan v Bancks* 1821, 4 B. & Ald. 401, 23 R. R. 318; *Malins v Freeman* 1838, 4 Bing. N. C. 395, 44 R. R. 737.

¹⁰ *Compare Davenport v Reg* 1877, J. C. from Queensland, 3 App. Ca. at 128; 47 L. J. P. C. 8, with *Governors of Magdalen Hospital v Knotts* (1879) 4 App. Ca. 344, 48 L. J. Ch. 579, in which case this latitude was at last restrained.

¹¹ *Warwick v Bruce* 6 Taunt. 118, affg 12 M. & S. 205, 14 R. R. 638.

¹² It seems that *prima facie* it is so, even if it contains clauses imposing penalties, or giving a power of dismissal, in certain events. *Wood v Fennell* (1842) 10 M. & W. 195, *Leslie v Fitzpatrick* (1877) 3 Q. B. D. 229, 47 L. J. M. C. 22, distinguishing *Reg. v. Lord* (next note).

¹³ (1848) 12 Q. B. 757, 17 L. J. M. C. 181, where the headnote rightly says "void against the infant," 76 R. R. 415.

good law, though the actual decision was not on this particular point in either case " And in an Irish case" it was expressly decided that at all events a lease made by an infant reserving a substantial rent, whether the best rent or not, is not void but voidable, and further that it is not well avoided by the infant granting another lease of the same property to another person after attaining his full age There is good English authority for the proposition that if a lease made by an infant is beneficial to him he cannot avoid it at all " It appears to be agreed that the sale, purchase," or exchange" of land by an infant is both as to the contract and as to the conveyance only voidable at his option

Again, there is no doubt that an infant may be a partner or shareholder (though in the latter case the company may refuse to accept him) " and though he cannot be made liable for partnership debts during his infancy, he is bound by the partnership accounts as between himself and his partners and cannot claim to share profits without contributing to losses And if on coming of age he does not expressly disaffirm the partnership he is considered to affirm it, or at any rate to hold himself out as a partner and is thereby liable for the debts of the firm contracted since his majority

The liability of an infant shareholder who does not repudiate his shares to pay calls on them rests as far as existing authorities go, on a somewhat different form of the same principle (of which afterwards) As to contribution in the winding up of a company Lord Lindley was not aware of any case in which an infant has been put on the list of contributories Upon principle however there does not appear to be any reason why he should not if it be for his benefit and this if there are surplus assets might be the case Otherwise he cannot be deprived of his right to repudiate the shares unless perhaps by fraud, but in any case if he "does not repudiate his shares either while he is an infant or within a reasonable time after he attains twenty-one he will be a contributory," and still more so if after that time he does anything showing an

⁶ *Zouch v. Parsons* 171, 3 Burr 1794 where the decision was that the reconveyance of a mortgagee's infant heir, the mortgage being properly paid off, could not be avoided by his entry before full age *Ellen v. Allen* 1842 2 Dr & W 307 340 59 R R 606 715

Slator v. Brady 1863 14 Ir C 1 Rep 61 The Court inclined to think that some act of notoriety by the lessor would be required such as entering bringing ejectment, or demanding possession note that a freehold estate for the life of the lessor or twenty-one years had passed by the original lease however there was another reason namely, that the second lease might be construed as only creating a future interest to take effect on the determination of the first

¹² *Maddon v. White* 1787 2 I R 159 1 R R 453 [Still earlier authority is *Aetsey's case* (1619) Cro Jac 320]

¹³ *Co Lit* 2 b *Bac Ab Infancy* 1 3 4 360

¹⁴ *Co Lit* 51 b

¹⁵ But the company cannot dispute the validity of a transfer to an infant after the infant has transferred over to a person *in utero* *Coach's case* (1872) L R 8 Ch 266, 42 L J (Ch 381 And see *Lindley on Companies* (6th ed 1902) 1125-1126

¹⁶ *Lindley, Partnership* (10th ed 1915), 92 94 *Goode v. Harrison* 1821 5 B & Ald 147 24 R R 307

¹⁷ *On Companies* 6th ed 1902, 1106

election to keep the shares. On the whole it is clear on the authorities (notwithstanding a few expressions to the contrary), that both the transfer of shares to an infant and the obligations incident to his holding the shares are not void but only voidable."

Marriage is on a different footing from ordinary contracts," and it is hardly needful to say that the possibility of a minor contracting a valid marriage has never been doubted in our Courts. *

As to promises to marry and marriage settlements, it has long been familiar law that just as in the case of his other voidable contracts an infant may sue for a breach of promise of marriage, though he or she is not liable to be sued. † An infant's marriage settlement is not binding on the infant unless made under the statute (see p. 62), and the Court of Chancery has no power to make it binding in the case of a ward. ‡ Particular covenants in an infant's settlement may be valid. § In any case the settlement is not void but only voidable, it may be confirmed by the subsequent conduct of the party when of full age and *sui juris*, † and can be repudiated only within a reasonable time after attaining full age. ** Again an infant's contract on a bill of exchange or promissory note was once supposed to be wholly void, but is now treated as only voidable. ‡ The same holds at common law of an account stated. §

There is one exception to the rule that an infant may enforce his voidable contracts against the other party during his infancy, or rather there is one way in which he cannot enforce them. Specific performance is not allowed at the suit of an infant, because the remedy is not mutual, the infant not being bound.

An infant may avoid his voidable contracts (with practically few or no exceptions) either before or within a reasonable time after coming of age: the rule is that matters *in fact* (i.e., not of record) he shall avoid either within age or at full age, but matters of

* *Lumsden v. Lee* (1868) L. R. 4 Ch. 31. *Gooch* case last page (p. pp. 54, 55).

† Continental writers have wasted much ingenuity in debating with which class of contracts it should be reckoned.

‡ For details see FINEL, *Laws of England—Marriage* [Simpson Infants, 4th ed. 1926, Index—Marriage].

§ *Bacon, Abr. Infancy and Age* 1, 4, 4, 370. Per Lord Ellenborough, *Harwood v. Bruce* (1813) 2 M. & S. 205, 14 R. R. 634.

† *Fild v. Moore* (1875) 2 D. M. G. 691, 710, 25 L. J. Ch. 66.

‡ *Smith v. Lucas* (1881) 18 Ch. D. 731, not overruled on this point by *Edwards v. Carter* (1893) A. C. 360, 63 L. J. Ch. 100.

§ *Dacey v. Dacey* (1870) L. R. 9 Eq. 468, 30 L. J. Ch. 343. This is not affected by the Infants Relief Act, 1874. *Duncan v. Dixon* (1890) 44 Ch. D. 211, 59 L. J. Ch. 437. A woman married under age is not disabled by the coverture from confirming an ante-nuptial settlement after she is of age. *Re Hodson's Settlement* (1894) 2 Ch. 421, 63 L. J. Ch. 609.

** Without regard to the date at which any particular interest affected may fall into possession. *Edwards v. Carter* (1893) A. C. 360, 63 L. J. Ch. 100, *Carnell v. Harrison* [1916] 1 Ch. 328, 85 L. J. Ch. 321, C. A. And election must be made once for all, not separate elections for each acquisition. see *Fidatz v. O'Hagen* (1899) 2 Ch. 569, 576.

† *Undisputed in Harris v. Wall* (1847) 1 Ex. 122, 16 L. J. Ex. 270, foll. *In re Hodson's Settlement* [1894] 2 Ch. 421, 63 L. J. Ch. 609.

‡ *Williams v. Moor* (1843) 11 M. & W. 256, 264, 266, 12 L. J. Ex. 253.

§ *Flight v. Bolland* (1828) 4 Russ. 298, 28 R. R. 101.

record only within age (Co. Lit. 380 b).²⁴ Subject to the general rule, established for the benefit of innocent third persons, that voidable transactions are not invalid until ratified but valid until rescinded,²⁵ an infant cannot deprive himself of the right to elect at full age, and only then can his election be conclusively determined.²⁶ If an infant pays a sum of money under a contract, in consideration of which the contract is wholly or partly performed by the other party, he can acquire no right to recover the money back by rescinding the contract when he comes of age. Such is the case of a premium paid for a lease,²⁷ or of the price of goods (not being necessities) sold and delivered to an infant and paid for by him, and so if an infant enters into a partnership and pays a premium, he cannot either before or after his full age recover it back, nor therefore prove for it in the bankruptcy of his partners.²⁸

So if an infant has applied for shares in a company and shares having a measurable market value have thereupon been allotted the money paid for the shares is not recoverable even though no dividend has been received.²⁹

Nothing less than total failure of consideration will be ground for recovering back money paid receipt of anything having marketable value whether any pecuniary benefit results or not will bar the claim.³⁰ This of course does not preclude the infant, in case the agreement is not fully performed on his part at the date of full age from repudiating any further obligation.

We must now consider the Act of 1874 (37 & 38 Vict. c. 62) which enacts as follows:—

1 All contracts whether by specialty or by simple contract heretofore entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities) and all accounts stated with infants shall be absolutely void provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute or by the rules of common law or equity enter except such as now by law are voidable.

2 No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy.

²⁴ See per Parke B. *Newry and Kinniskillen R. Co. v. Coombe* (1849) 3 Ex. 565, 18 L. J. Ex. 325; per Cur. *I. & N. W. R. v. M. Michael* (1850) 5 Ex. 114, 20 L. J. Ex. 97, 82 R. R. 898. As to an infant being bound when he comes of age by an acknowledgment made in a Court of Record, see Y. B. (Rolls Series) 20 & 21 Ed. I. p. 320.

²⁵ Per Lord Colonsay, L. R. 2 H. L. 375.

²⁶ *L. & N. W. R. v. M. Michael*, note ²⁵; *Slaton v. Trimble* (1861) 14 Ir. C. L. Rep. 342.

²⁷ *Holmes v. Blogg* 1817 8 Taunt. 35, 508 & 1 Moore 466, 2 Moore 552, 19 R. R. 445.

²⁸ *Ex parte Taylor* (1856) 8 D. M. G. 254, 258. But if the infant has received no consideration at all he can recover. *Hamilton v. Vaughan-Sherrin, & Co.* [1894] 3 Ch. 589, 63 L. J. Ch. 795.

²⁹ *Sternberg v. Scala* (Leadi), *Lid* [1923] 2 Ch. 452, 92 L. J. Ch. 944 C. A.

³⁰ *Sternberg v. Scala*, last note, overruling Surling J.'s opinion in *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.* [1894] 3 Ch. 589, 63 L. J. Ch. 795. In the latter case it does not appear whether the shares allotted to the plaintiff had any assignable value.

or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age

3 This Act may be cited as The Infants Relief Act, 1874

The 2nd section⁴¹ forbids an action to be brought on any promise or ratification of a contract made during infancy, and it applies to a ratification since the Act of a promise made in infancy before the passing of the Act,⁴² whether the agreement is or is not one of those included in s. 1.⁴³ It probably also prevents the ratification from being available by way of set-off.⁴⁴ This, however, is a different thing from depriving the ratification of all effect. For it may have other effects than giving a right of action or set-off, and these are not touched. While the matter was governed by Lord Tenterden's Act⁴⁵ there were many cases where a contract made during infancy might be adopted or confirmed without any ratification in writing so as to produce important results. Thus in the case of a marriage settlement the married persons are bound not so much by liability to be sued (though in some cases and for some purposes the husband's covenants are of importance) as by inability to interfere with the disposition of the property once made and the execution of the trusts once constituted, and so far as concerns this an infant's marriage settlement may, as we have seen, be sufficiently confirmed by his or her conduct after full age.⁴⁶ Again an infant partner who does not avoid the partnership at his full age is, as between himself and his partners, completely bound by the terms on which he entered it without any formal ratification, and in taking the partnership accounts the Court would apply the same rule to the time of his minority as to the time after his full age.⁴⁷ Again an infant shareholder who does not disclaim may after his full age, at any rate, be made liable for calls without any express ratification; on the contrary, the burden of proof is on him to show that he repudiated the shares within a reasonable time.⁴⁸

And as Lord Tenterden's Act did not formerly stand in the way of these consequences of the affirmation or non repudiation of an

⁴¹ The Act of 1874 supersedes the 5th section of Lord Tenterden's Act 9 Geo. 4 c. 14⁵, by which no ratification of such a contract could be sued upon unless in writing and signed by the party to be charged since expressly repealed by the Statute Law Revision Act 1875 (38 & 39 Vict. c. 66).

⁴² *Ex parte Kibble* (1875) L. R. 10 Ch. 373, 44 L. J. Bk. 63.

⁴³ *Coxhead v. Mullis* (1878) 5 C. P. D. 439, 47 L. J. C. P. 761. It is held, however, that in a case which would before the Act have been one of ratification it may be left to the jury to say whether the conduct of the parties amounts to a new promise. *Ditcham v. Worrall* (1880) 5 C. P. D. 410, 49 L. J. C. P. 688, by Lindley and Denman JJ. *dis. Lord Coleridge C.J.*

⁴⁴ *Rauley v. Rauley* (1876) 1 Q. B. Div. 460, 45 L. J. Q. B. 675.

⁴⁵ See note ⁴¹.

⁴⁶ *Davies v. Davies* (1870) L. R. 7 Eq. 468, 39 L. J. Ch. 343, *supra*, p. 50. In *Duncan v. Dunn* (1890) 44 Ch. D. 211, 59 L. J. Ch. 437, an attempt was made to bring an infant's marriage settlement within s. 1, on the ground that it must be read as including all contracts whatever. The Act is not quite so ill-drawn as to admit this construction.

⁴⁷ See pp. 49-50.

infant's contract, so the Act of 1874 does not now stand in the way of the same or like consequences. In fact the operation of the present Act seems to be to reduce all voidable contracts of infants ratified at full age, whether the ratification be formal or not, to the position of agreements of imperfect obligation, that is, which cannot be directly enforced but are valid for all other purposes. Other examples of such agreements and of their legal effect will be found in the last chapter of this book.

A collateral result of the Act appears to be that one who has made a contract during his infancy is not now able to obtain specific performance of it after his full age, for the same reason that he cannot and formerly could not do so sooner.*

The proviso as to new consideration meets such cases as that of an attempt to set up as a new contract the compromise of an action brought on the original promise." It is reinforced by s. 5 of the Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), which absolutely avoids all agreements and instruments (even negotiable ones) made for the payment of money representing or connected with a loan advanced during infancy." An agreement for the sale of chattels is within the Act and the same principles apply to it."

In the first section of the principal Act, the words concerning the purchase of goods are not free from obscurity. If we might construe the Act as if it said "for payment for goods supplied," &c., it would be clear enough: but it is not so clear what is the precise operation of an enactment that contracts "for goods supplied or to be supplied," other than necessities, shall be void. It seems to follow that no property will pass to the infant by the attempted contract of sale, and that if he pays the price or any part of it before delivery of the goods he may recover it back; as indeed he might have done before the Act, for the contract was voidable, and he was free to rescind it within reasonable time. But it is now settled that if the goods are delivered the property passes; and an infant who has paid for goods and received and used them cannot recover the money back." The policy of the statute is to protect infants from running into debt, not to disable them from making purchases for ready money. Moreover it has been held that an infant may be guilty of larceny as a bailee though the goods were delivered to him on an agreement void under the Act." On the whole it seems that goods actually delivered can be returned, and the price recovered back, only so far and so long as complete restitution is possible. In the converse case of an infant agreeing to sell goods, receiving the

* *Flight v. Bolland* (1828) 4 Russ. 298; 28 R. R. 101, *supra*, p. 50.

** *Smith v. King* [1892] 2 Q. B. 543; 67 L. T. 420.

** 55 & 56 Vict. c. 4. The rest of the Act is criminal.

** *Pearce v. Brain* [1929] 2 K. B. 310; 98 L. J. K. B. 559.

** *Stack v. Wilson* [1913] 2 K. B. 235; 82 L. J. K. B. 598.

** *Valentini v. Canali* (1889) 24 Q. B. Div. 166; 59 L. J. Q. B. 74. [Followed in *Pearce v. Brain* (note **), a case of exchange of goods.]

** *R. v. McDonald* (1885) 15 Q. B. D. 393; 52 L. T. 583.

price, and failing to deliver, the buyer cannot recover unless there are special facts showing a cause of action independent of contract."

It has been suggested that the exception of "contracts for necessities" may include loans of money advanced and in fact used for the purpose of buying necessities. The point is not known to have been judicially considered. [At Common Law, there are decisions that no action is maintainable for the recovery of such a loan, 'it may be borrowed for necessities, but laid out and spent at a tavern'"] It was an old rule in equity that a person so advancing money was entitled to stand in the legal creditor's place to the extent of what was actually spent on necessities;" and so it is as to advances for the support of a deserted wife."

It is doubtful whether a bond, bill of exchange, or note given by a man of full age, for which the consideration was in fact the supply of goods not necessities during his infancy, would be void under s. 1. But s. 2, which indeed seems altogether more useful than s. 1, would no doubt effectually prevent it from being enforced as between the immediate parties though perhaps the words are not the most apt for that purpose.

The Building Societies Act 1874 (37 & 38 Vict. c. 42) s. 38 enables an infant to be a member, but this does not imply any exemption from the disability to mortgage his real estate created by the Infants Relief Act for that is not the sole purpose or a necessary purpose of membership.

OF THE LIABILITY OF INFANTS ON OBLIGATIONS INCIDENT TO INTERESTS IN PERMANENT PROPERTY

In an old case reported under various names in various books⁶⁰ it was decided that an infant lessee who continues to occupy till he comes of full age is after his full age liable for arrears of rent incurred during his infancy. In like manner a copyholder who was admitted during his minority and had not disclaimed was bound to pay the fine.⁶¹ The same principle is applied to the case of infant shareholders in railway companies. An infant is not incapable of being a shareholder⁶² and as such is *prima facie* liable when he

⁶⁰ *Gouern v. Nield* [1912] 2 K. B. 419, 81 L. J. K. B. 865.

⁶¹ *Earle v. Peale* (1711) 1 Salk. 386, *Darby v. Boucher* (1692) 1 Salk. 279.

⁶² *Marlow v. Pufield*, 1 P. Wms. 548, and see *Leuns v. Allern* (1888) 4 Times L. R. 560.

⁶³ *Deare v. Soult* (1869) L. R. 9 Eq. 151. Cp. *Reversion, &c. Co. v. Mason Convey* [1913] 1 K. B. 464, 82 L. J. K. B. 512, C. A. (money borrowed to pay company's debts by director lender having notice of his want of authority).

⁶⁴ *Co. Flight v. Reed* (1869) 1 H. & C. 703, 32 L. J. Ex. 265.

⁶⁵ *Thurston v. Nottingham, &c. Building Soc.* [1902] 1 Ch. 1, 71 L. J. Ch. 83, [1903] A. C. 6; see *Nottingham, &c. v. Thurston*.

⁶⁶ *Kittle v. Elton* (1614) Rolle Ab. 1, 731, K., Cro. Jac. 320, Brownlow, 120, 2 Bulst. 69. See the judgment of the Court of Exchequer in *L. & N. W. Ry. Co. v. M'Alister* (1850) 5 Ex. 114, 20 L. J. Ex. 97, 82 R. R. 808.

⁶⁷ *Evelyn v. Clanchester* (1765) 3 Burr. 1717.

⁶⁸ He can subscribe a memorandum of association. *Luxon & Co.* (No. 2) (1891) 40

comes of age to be sued for calls on his shares. He can avoid the liability (which, though regulated by statute, has the general incidents of contract) only by showing that he repudiated the shares either before attaining his full age," or in a reasonable time afterwards." A railway shareholder is not a mere contractor, but a purchaser of an interest in a subject of a permanent nature with certain obligations attached to it; and those obligations he is bound to discharge, though they arose while he was a minor, unless he has renounced the interest. A mere absence of ratification is no sufficient defence, even if coupled with the allegation that the defendant has derived no profit from the shares. For if the property is unprofitable or burdensome, it is the holder's business to disclaim it on attaining his full age, if not before; and perhaps he could not exonerate himself even during his minority by showing that the interest was not at the time beneficial, unless he actually disclaimed it." Comparing the analogous case of a lease, the Court said:—"We think . . . the more reasonable view of the case is, that the infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession, and has not disclaimed, at all events unless he still be a minor." Similarly an infant member of a building society who has purchased land by means of an advance from the society cannot claim to hold the property free from the society's charge for the money advanced.* In all the decided cases the party appears to have been of full age at the time of the action being brought, but there is nothing to show that (except possibly in the case of a disadvantageous contract) he might not as well be sued during his minority.

The same results, except perhaps as to suing the shareholder while still a minor, would follow from the general principles of the law of partnership even if the company in which the shares were held had not any permanent property.

OF THE LIABILITY OF AN INFANT WHEN THE CONTRACT IS FOR HIS BENEFIT, AND ESPECIALLY FOR NECESSARIES

[In the reports a distinction is taken between contracts for an infant's benefit and contracts for necessities, but there is dense confusion as to what the distinction is. Fortunately, it is not of much practical importance, for an infant is equally liable, whether he has acquired necessities or has been benefited. The plaintiff

* *Arvry & Ennstullen Ry. Co. v. Coombe* (1849) 3 Ex. 565; 18 L. J. Ex. 325.

** A plea which merely alleged repudiation after full age was therefore held bad in *Dublin & Wicklow Ry. Co. v. Black* (1852) 8 Ex. 181; 22 L. J. Ex. 94; 91 R. R. 422.

** It is submitted that in such a case the disclaimer if made would conclusively determine his interest and not merely suspend it.

** *L. & N. W. Ry. Co. v. M'Michael* (1850) 5 Ex. 114, 128; 20 L. J. Ex. 97, 101; 82 R. R. 599. [Pollock's view was quoted with approval by Roche, J., in *Davis v. Beynon-Harris* (1931) 47 T. L. R. 424.]

** *Thurston v. Nottingham Permanent Benefit Building Soc.* [1903] A. C. 6.

has a heavier burden of proof in the case of necessities, and the Sale of Goods Act, 1893, is limited to goods that are necessities (p. 57)."

It has been laid down in general terms that if an agreement be for the benefit of an infant at the time, it shall bind him," or even that the contract is binding unless manifestly to the infant's prejudice. "An infant's contract of apprenticeship," or an ordinary contract to work for wages, will, if it be reasonable, be considered binding on the infant—he cannot repudiate it unless repudiation is for his benefit," and he may no less than an adult incur the statutory penalties for unlawfully absenting himself from his master's employment. An infant entered the service of a railway company and, as a condition of the service, became a member of an insurance society established by the company, the funds were augmented by the company to the extent of five-sixths of the premiums payable by the members. The rules provided for compensation in all cases of accident not due to the member's own wilful act or gross negligence and bound the members to accept the benefits of the society in lieu of any claims under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42). The Court of Appeal held that the infant was bound by this agreement as being on the whole for his benefit. But an action will not lie against an infant on a covenant in apprenticeship indentures," and if the terms are not reasonable the agreement is void for all purposes, so that an action will not lie against a stranger for enticing away the apprentice." Again there are many conceivable cases in which it might be for an infant's benefit, or at least not manifestly to his prejudice, to enter into trading contracts, or to buy goods

¹¹ [The distinction is discussed in *Salmond & Winfield Contracts* 450, 454.]

¹² *Maddon v White* 1787, 2 T. R. 159, 1 R. R. 453.

¹³ *Cooper v Simmons* 1862, 7 H. & N. 707, 721, 12 F. R. 653, 663, per Wille B. Not so strongly put in the L. J. report, 31 L. J. M. C. 198, 144.

¹⁴ *Wood v Fensholt* 1842, 10 M. & W. 195.

¹⁵ *Waterman v Frier* [1922] 1 K. B. 310, 91 L. J. K. B. 315.

¹⁶ *Clements v I & N B. Ry. Co.* [1894] 2 Q. B. 482, 63 L. J. Q. B. 317. It seems though it was not necessary to decide the point that the principle of an infant's contract being valid when the Court is satisfied that it was for his benefit is not confined, as was argued for the plaintiff, to contracts of apprenticeship or labour—see especially the judgment of Kay J. J. which is on the whole confirmed by the judgments in *Doyle v White City Stadium* [1935] 1 K. B. 110, 104 L. J. K. B. 140, especially that of Lord Hanworth M.R. Note as to the Workmen's Compensation Act that there is nothing in it to make a statutory agreement for compensation binding on an infant if not for his benefit. *Stephens v Dudbridge Ironworks Co.* [1904] 2 K. B. 225, 71 L. J. K. B. 739, A.C. [applied and followed in *Murray v Schweichman, Ltd.* [1938] 1 K. B. 139, a decision on the Workmen's Compensation Act 1925, 15 and 16 Geo. 5, c. 84.]

¹⁷ *De Francesco v Barnum* No. 1, 1889, 43 Ch. D. 165, 59 L. J. Ch. 151, following old authority which must now be regarded as anomalous.

¹⁸ *De Francesco v Barnum* No. 2, 1890, 45 Ch. D. 430, 63 L. T. 438. A clause enabling the master to suspend the apprentice's wages in an event which may be due to the master's own act, say a lock-out, is not reasonable. *Corn v Matthews* [1893] 1 Q. B. 310, 62 L. J. M. C. 61, C. A., but *Green v Thompson* [1899] 2 Q. B. 1, 68 L. J. Q. B. 719, where the exception was of days when the business should be at a standstill by accidents beyond the control of the master. [In *Olson v Corry* [1936] 3 All E. R. 241, a condition in an apprenticeship deed, which excluded all liability for negligence of the instructor, was held to make the deed void.]

other than necessities: one can hardly say for example that it would be manifestly to the disadvantage of a minor of years of discretion to buy goods on credit for re-sale in a rising market; yet there is no doubt whatever that such a contract would at common law be voidable at his option.⁷⁶ Nor has it ever been suggested that an infant partner or shareholder is at liberty to disclaim at full age only in case the adventure has been unprofitable or is obviously likely to become so. However, inasmuch as since the Infants Relief Act, 1874, an infant's contract, if not binding on him from the first, can never be enforced against him at all, it seems quite possible that the Courts may in future be disposed to extend rather than to narrow the description of contracts which are considered binding because for the infant's benefit.⁷⁷ Where a special kind of employment (in this case, professional boxing) is in fact regulated by a licensing and controlling body, conditions attached to a licence issued to an infant may be so connected with a specific contract of employment that the Court will regard them as part of a whole transaction for the infant's benefit.⁷⁸ A contract may be for an infant's benefit as a whole though particular terms are bad as being in excessive restraint of trade or the like.⁷⁹ A contract whereby an infant agrees with a railway company, in consideration of being allowed to make a certain habitual journey to and fro on special terms, to waive all claims for accident to himself or his property, is detrimental to the infant and not binding on him.⁸⁰

CONTRACTS FOR NECESSARIES

By the Sale of Goods Act, 1893 (56 & 57 VICT. C. 71) s. 2—

" . . . Where necessities are sold and delivered to an infant . . . or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

" 'Necessaries' in this section mean goods suitable to the condition in life of such infant . . . or other person, and to his actual requirements at the time of the sale and delivery."

This enactment is a legislative declaration of the law as settled by a series of authorities, of which the judgment of the Exchequer Chamber in *Ryder v. Wombwell* is the chief:—

" The general rule of law is clearly established, and is that an infant is generally incapable of binding himself by a contract. To this rule there is an exception introduced, not for the benefit of the tradesman who may trust

⁷⁶ Indeed, it seems the distinction in question is not applicable to any trading contract. *Quorn v. Nield* [1912] 2 K. B. 419; 81 L. J. K. B. 865. [Applied in *Mercantile Union Guarantee Corporation, Ltd. v. Ball* [1937] 2 K. B. 498; 106 L. J. K. B. 261.]

⁷⁷ In an action brought by an infant, an undertaking given by the infant's next friend is not binding if the circumstances are such that it cannot be for the infant's benefit. *Rhodes v. Sunthenbank* (1889) 22 Q. B. Div. 577; 58 L. J. Q. B. 287.

⁷⁸ *Doyle v. White City Stadium* [1935] 1 K. B. 110; 104 L. J. K. B. 140, C. A. (authorities reviewed, importance of regarding the effect of the agreement as a whole emphasized).

⁷⁹ *Bromley v. Smith* [1909] 2 K. B. 295; 78 L. J. K. B. 745.

⁸⁰ *Flower v. L. & N. W. Ry. Co.* [1894] 2 Q. B. 65; 63 L. J. Q. B. 547, C. A.

the infant, but for that of the infant himself. This exception is that he may make a contract for necessities."¹⁰ And as is accurately stated by Parke B in *Peters v. Fleming*:¹¹ "From the earliest time down to the present the word necessities is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, degree and station in life in which he is, and therefore we must not take the word necessities in its unqualified sense, but with the qualification above pointed out."¹²

What in any particular case may fairly be called necessary in this extended sense is what is called a question of mixed fact and law—that is, a question for a jury, subject to the Court being of opinion that there is evidence on which the jury may not unreasonably find for the plaintiff.

The station and circumstances of the defendant and the particulars of the claim being first ascertained, it is then for the Court to say whether the things supplied are *prima facie* such as a jury may reasonably find to be necessities for a person in the defendant's circumstances, or—whether the case is such as to cast on the plaintiff the onus of proving that the articles are within the exception (*i.e.*, are necessities), and then whether there is any sufficient evidence to satisfy that onus.¹³ In the latter case the plaintiff must show that although the articles would generally not be necessary for a person in the defendant's position, yet there exist in the case before the Court special circumstances that make them necessary. Thus articles of diet which are otherwise mere luxuries may become necessities if prescribed by medical advice.¹⁴ It is said that in general the test of necessity is usefulness, and that nothing can be a necessary which cannot possibly be useful—but the converse does not hold, for a useful thing may be of unreasonably costly fashion or material. It is to be borne in mind that the question is not whether the things are such that a person of the defendant's means may reasonably buy and pay for them—but whether they can be reasonably said to be so necessary for him that, though an infant, he must obtain them on credit rather than go without. For the purpose of deciding this question the Court will take judicial notice of the ordinary customs and usages of society.¹⁵

If the Court does not hold that there is no evidence on which the supplies in question may reasonably be treated as necessities, then it is for the jury to say whether they were in fact necessities for the defendant under all the circumstances of the case.

The Act has laid down, in accordance with the weight of

¹⁰ [Data that are more recent make it arguable that the basis of this exception is quasi-contract, *ante*, p. 47, n. 5.]

¹¹ (1840) 6 M. & W. at 46.

¹² (1868) 1 L. R. 4 Ex. 32, 38, in the Court below 1 L. R. 3 Ex. 90, 38 L. J. Ex. 8.

¹³ [L. R. 4 Ex. at 40.]

¹⁴ See *Wharton v. Mackenzie* (1884) 5 Q. B. 606; 13 L. J. Q. B. 130, 64 R. R. 584, and per Bramwell B., 1 L. R. 3 Ex. at 96.

¹⁵ L. R. 4 Ex. at 40.

authority," that the buyer's actual requirements must be considered. If the goods supplied are necessary, the tradesman will not be the less entitled to recover because he made no inquiries as to the infant's existing supplies; but if the infant is already so well supplied that these goods are in truth not necessary, the tradesman's ignorance of that fact will not make them necessary, and he cannot recover. There is no rule of law casting on him a positive duty to make inquiries, but he omits to do at his peril and the burden of proof is on him to show that the infant was not sufficiently supplied." But the defendant having an income out of which he might keep himself supplied with necessities for ready money is not equivalent to his being actually supplied, and does not prevent him from contracting for necessities on credit. " Since the Act, at all events, the infant buyer can be liable only for the reasonable price of the goods, and it seems that this was always the law, though before the Infants Relief Act he could at full age ratify a contract for an agreed price, whether for necessities or not "

Juries, if not warned against it, would be apt to test the necessary character of supplies, not so much by what the means and position of the buyer actually were, as by what they appeared to be to the seller, and such a view was not altogether without countenance from authority. " It is conceived, however, that the knowledge or belief of the tradesman has nothing to do with the question whether the goods are necessary or not. It may be said that the question for the Court will, as a rule, be whether articles of the general class or description were *prima facie* necessities for the defendant, and the question for the jury will be whether, being of a general class or description allowed by the Court as necessary, the particular items were of a kind and quality necessary for the defendant, having regard to his station and circumstances. For instance, it would be for the Court to say whether it was proper for the defendant to buy a watch on credit, and for the jury to say whether the particular watch was such a one as he could reasonably afford. But this will not hold in extreme cases. In *Ryder v. Wombwell*" the Court of Exchequer Chamber held, reversing the

¹¹ See *Johnstone v. Marks* (1887) 19 Q. B. D. 509, 57 L. J. Q. B. 6, decided by members of the C. A. sitting as a Divisional Court.

¹² *Nash v. Inman* [1908] 2 K. B. 1, 77 L. J. K. B. 626 (C. A.). How the plaintiff is to obtain this information does not appear.

¹³ *Burghart v. Hall* (1839) 4 M. & W. 727, 51 R. R. 788. *Contra, Mortara v. Hall* (1834) 6 Sim. 465. The doctrine there laid down seems superfluous, for the supplies there claimed for (such as 200 pairs of gloves in half a year) could not have been reasonably found necessary in any case. [*Burghart v. Hall* was approved by Parke B. in *Peters v. Fleming* (1840) 6 M. & W. 42, 46, and regarded as established law by Field J. in *Barnes & Co. v. Toye* (1884) 13 Q. B. D. 410, 412.]

¹⁴ Judgment of Fletcher-Moulton L. J. [1908] 2 K. B. at 8.

¹⁵ In *Dalton v. Gib* (1839) 5 Bing N. C. 128, 50 R. R. 758, and Preface, 7 Scott 117, much weight is given to the apparent rank and circumstances of the party. This amounts to supposing that an infant may be liable, by a kind of holding out, for goods which are not necessary in fact.

¹⁶ (1868) L. R. 4 Ex. 32; 38 L. J. Ex. 8. And an entire contract for goods of which a substantial part are not necessary will not be saved by some of them being necessary: *Stocks v. Wilson* [1913] 2 K. B. 235, 82 L. J. K. B. 598.

judgment of the majority below on this point, that because a young man must fasten his wristbands somehow it does not follow that a jury are at liberty to find a pair of jewelled solitaires at the price of 25*l.* to be necessities even for a young man of good fortune.

[Two problems, on which there is no direct authority, arise on the interpretation of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) s. 2, relating to the sale of necessities to an infant (p. 57).]

(1) Must the seller prove that the goods were necessities (as defined by s. 2) both at the time of sale and at the time of delivery?

(2) If necessities are sold to an infant who refuses to take delivery of them merely because he has changed his mind, is he liable to the seller and, if so on what grounds?

Both questions have been fully investigated elsewhere* and it is sufficient to summarize here the results of the investigation. It is important to recollect that s. 2 relates not only to infants but also to persons mentally incapable or drunk (pp. 71-75).

As to (1), it is submitted that the phrases 'sale and delivery,' 'goods sold and delivered,' used in s. 2 are simply references to the action 'for goods sold and delivered' which, prior to the Act, had long been the usual remedy of the seller seeking to recover the price of necessities. A characteristic of this action was and still is that, whether it were brought against an infant or any one else, it could not be successful unless the goods had been delivered. Hence, s. 2 ought to be interpreted as requiring the seller to prove that the goods were suitable to the requirements of the infant at the time of delivery and at that time only. There is nothing inconsistent with this conclusion in any decision since the Act.

As to (2), the better view seems to be that nowadays no action of any sort is maintainable against an infant for necessities which he has ordered but of which he refuses to take delivery. It is likely that this was so just before the Sale of Goods Act passed. The action for goods sold and delivered was not feasible because the goods had not been delivered, and, though the action 'for goods bargained and sold' and perhaps an action for damages for breach of contract were theoretically possible in the sense that there are some traces of them having been employed for this purpose in earlier times, there is no modern instance of the seller of goods to an infant having made use of them. The Infants Relief Act, 1874 (p. 51) might perhaps be construed as recognizing the possibility of these remedies. It avoids contracts for 'goods supplied or to be supplied (other than contracts for necessities),' and it is arguable that the exception as to 'contracts for necessities' includes contracts in which they are 'to be supplied,' i.e., contracts in which delivery of them has not yet taken place. But the phrase is at best ambiguous and there is no need to select that interpretation of it which would run counter to the increasing tendency of the law to

* Cf. 51 L. Q. R. 270-272, and Anson, *Contract* (10th ed.), 132-133.]

protect infants against improvident bargains. The conclusion that the infant is not liable may seem inconsistent with *Roberts v Gray*.¹¹ There an infant agreed to go on tour as a professional billiard player under the tuition of another famous billiard player, to share travelling expenses out of his own earnings so far as they went and to play only on tables of a particular manufacture. The Court of Appeal held that the contract was for a necessary and that the infant was liable upon it, even though he repudiated it while it was executory. But throughout the whole case nothing was said of the sale of goods which are necessities and, the facts being what they were, there was no reason why that point should have been raised. No doubt the interpretation of s. 2 which we have submitted seems illogical by the side of *Roberts v Gray*, but it is by no means the only incongruity that disfigures the law relating to the contracts of infants.]

Hitherto we have spoken of a tradesman supplying goods, this being by far the most common case. But the range of possible contracts for necessities is a much wider one. It is clearly agreed by all the books that speak of this matter, that an infant may bind himself to pay for his necessary meat, drink, apparel, physic (including of course fees for medical attendance, &c.¹²) as well as the mere price of medicines, and such other necessities, and like wise for his good teaching and instruction, whereby he may profit himself afterwards. Thus learning a trade may be necessary, and on that principle an infant's indenture of apprenticeship may be binding on him. A contract for necessary instruction is not the less binding for being executory.¹³ The preparation of a settlement containing proper provisions for her benefit has been held a necessary for which a minor about to be married may make a valid contract, apart from my question as to the validity of the settlement itself.¹⁴

A more remarkable extension of the definition of necessities is to be found in *Chapple v Cooper*,¹⁵ where an infant widow was sued for her husband's funeral expenses. The Court held that decent burial may be considered a necessary for every man and husband and wife being in law the same person, the decent burial of a deceased husband is therefore a necessary for his widow. It would perhaps have been better to adopt the broader ground that a contract entered into for the purpose of performing a moral and

¹¹ [1913] 1 K. B. 520, 82 L. J. K. B. 362.]

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social, if not legal, duty, which it would have been scandalous to omit, is of as necessary a character as any contract for personal service or purchase of goods for personal use.

The supply of necessities to an infant creates only a liability as on simple contract, and it cannot be made the ground of any different kind of liability. Coke says "If he bind himself in an obligation or other writing with a penalty for the payment of any of these that obligation shall not bind him"¹ Similarly his negotiable instruments are voidable even if given to pay for necessities.² A *mortgage*, a deed given by an infant to secure the repayment of money advanced to buy necessities is voidable.³ But in these and similar cases the infant's liability on simple contract or rather quasi contract is not affected.

Some particular dealings of infants were formerly valid under customs incident to tenures now abolished.⁴

Statutory powers of dealing with infants' property are matter for conveyancers and not within the scope of this book for any practical purpose. They are now mostly reenacted with some little reinforcement in recent consolidating Acts.

OF AN INFANT'S IMMUNITY AS TO WRONGS CONNECTED WITH CONTRACT

An infant is generally no less liable than an adult for wrongs committed by him, subject only to his being in fact of such age and discretion that he can have a wrongful intention where such intention is material, but he cannot be sued for a wrong when the cause of action is in substance *ex contractu*, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract, which is in the analogous case of married women.⁵ the law does not allow. Thus it was long ago held that an infant innkeeper could not be made liable in an action on the case for the loss of his guests' goods.⁶ There is another old case reported in divers books⁷ where it was decided that an action of deceit will not lie upon an assertion by a minor that he is of full age. It was said that if such actions were allowed all the infants in England would be ruined for though not bound by their contracts they would be made liable as for tort and it appears in

¹ Co. Litt. 172 a, cp. 3 I. R. 363.

² *Re Soltykoff, Ex parte Margrett* [1891] 1 Q. B. 413, 60 L. J. Q. B. 339 C. A.

³ *Martin v. Gale* 1876 4 Ch. D. 428 46 L. J. Ch. 84.

⁴ *Walter v. Feaward* [1891] 2 Q. B. 369 60 L. J. Q. B. 738 C. A.

⁵ *Robinson on Gavelkind*, 194. See other local customs collected, Bateson, Borough Customs (Seld. Soc. 1906) ii. 157, 160.

⁶ See in particular the Settled Land Act, 1925, s. 26, and Sched. 2, par. 3, Administration of Estates Act, 1925, s. 39. Note that a legal estate cannot now be held by an infant. Law of Property Act 1925, s. 1 (6).

⁷ See pp. 65, 66.

⁸ Rolle Ab. 1, 2, Action sur Case, D. 3.

⁹ *Johnson v. Pie* (1665, Sid. 258, 1 Lev. 169, 1 Keb. 913, fully cited by Knight Bruce V.-C. in *Stikeman v. Dawson* [1847] 1 De G. & Sm. 113, 16 L. J. Ch. 205, 75 R. R. 47; and see other cases collected 1 De G. & Sm. at 110, where "the case mentioned in Keble" is that which, as stated in the text, occurs in his report of *Johnson v. Pie*.

Keble's report that an infant had already been held not liable for representing a false jewel not belonging to him as a diamond and his own. The modern case usually cited for this rule is *Jennings v. Rundall*,⁷ where it was sought to recover damages from an infant for overriding a hired mare. But if an infant's wrongful act, though concerned with the subject matter of a contract, and such that but for the contract, there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, then the infant is liable. The distinction is established and well marked by a modern case where an infant had hired a horse for riding, but not for jumping, the plaintiff refusing to let it for that purpose, the defendant allowed his companion to use the horse for jumping, whereby it was injured and ultimately died. It was held that using the horse in this manner being a manner positively forbidden by the contract was a mere trespass for which the defendant was liable.⁸

An infant can be made liable *quasi ex contractu* (as for money received) only when the real cause of action is a wrong independent of contract.⁹

LIABILITY IN EQUITY ON REPRESENTATION OF FULL AGE

When an infant has induced persons to deal with him by falsely representing himself as of full age he incurs an obligation in equity, which, however, in the case of a contract is not an obligation to perform the contract and must be carefully distinguished from it.¹⁰ Indeed it is not a contractual obligation at all. It is limited to the extent we have stated above (p. 47) and the principle on which it is founded is often expressed in the form: 'An infant shall not take advantage of his own fraud.' A review of the principal cases will show the correct doctrine. In *Clarke v. Cobley*,¹¹ the defendant being a minor had given his bond to the plaintiff for the amount of two promissory notes made by the defendant's wife before the marriage, which notes the plaintiff delivered up. The plaintiff on discovering the truth and after the defendant came of age filed his bill praying that the defendant might either execute a new bond, pay the money or deliver back the notes. The Court ordered the defendant to give back the notes, and that he should not plead to any action brought on them the Statute of

⁷ 1799 8 F. R. 335, 4 R. R. 680. It is also recognized in *Price v. Hewell* (1852) 8 F. R. 346, not a decision on the point.

⁸ *Burnard v. Haggis* (1863) 14 C. B. N. S. 45, 32 L. J. C. P. 180, 135 R. R. 593. A bailment at will would have been determined, as where a bailor commits theft at common law by breaking bulk.

⁹ *Cowen v. Aird* [1912] 2 K. B. 419, 81 L. J. K. B. 865, C. A.

¹⁰ *Att. Barlett v. Wells* (1862) 1 B. & S. 836, 31 L. J. Q. B. 57, 124 R. R. 774. Declaration for goods sold, &c. Plea, infancy. Equitable replication, that the contract was induced by defendant's fraudulent representation that he was of age. The replication was held bad, as not meeting the defence but only showing a distinct equitable right collateral to the cause of action sued upon.

¹¹ (1789) 2 Cox, 179, 2 R. R. 25. It must be taken, though it is not clear by the report, that the defendant falsely represented himself as of full age.

Limitation or any other plea which he could not have pleaded when the bond was given; but refused to decree payment of the money, holding that it could do no more than take care that the parties were restored to the same situation in which they were at the date of the bond. In *Lemprière v. Lange*, a quite modern case, it was held that an infant who had obtained the lease of a furnished house by representing himself of full age could not be made liable for use and occupation, although the lease could be set aside and the infant ordered to pay the costs of the action.¹² *Cory v. Gettcken*¹³ shows that when an infant by falsely representing himself to be of full age has induced trustees to pay over a fund to him, neither he nor his representatives can afterwards charge the trustees with a breach of trust and make them pay again. *Occleston v. Banister*¹⁴ confirms this—it was there held, however, that the release of an infant *cestui que trust* in such a case is binding on him only to the extent of the sum actually received by him. In *Stikeman v. Dawson*¹⁵ the subject of infants' liability for wrongs in general is discussed in an interesting judgment by Knight Bruce V. C. and the important point is decided that in order to establish this equitable liability it must be shown that the infant actually represented himself to be of full age—it is not enough that the other party did not know of his minority. And as there must be an actual false representation, so no claim for restitution can be sustained unless the representation actually misled the person to whom it was made. No relief can be given if the party was not in fact deceived—but knew the truth at the time, and it makes no difference where the business was actually conducted by a solicitor or agent who did not know.

An infant has been held liable to account for the proceeds of goods obtained by a false representation that he was of full age,¹⁶ this on the principle of following the property and not otherwise. The most express and fraudulent representation of full age will not enable a lender to an infant to recover his money either as a debt or as money had and received.¹⁷

¹² 1879, 12 Ch. D. 675. Followed on the question of costs *Baker v. Woolf* [1890] 1 Ch. 343, 58 L. J. Ch. 82.

¹³ 1816, 2 Madd. 40, 17 R. R. 186. ¹⁴ 1813, 3 Ha. 503.

¹⁵ *Cp. Wright v. Spence* 1848, 2 De G. & Sm. 321, 79 R. R. 220, where the first paragraph of the headnote seems to go beyond anything really decided.

¹⁶ 1817, 1 De G. & Sm. 90, 16 L. J. Ch. 205, 75 R. R. 37.

¹⁷ *Wilson v. Stocker* 1850, 4 De G. & J. 458, 38 L. J. Ch. 751. As to a married woman's similar fraud, see p. 66.

¹⁸ *Stocks v. Wilson* [1913] 2 K. B. 235, 82 L. J. K. B. 508.

¹⁹ *R. Leslie v. Shell* [1914] 3 K. B. 607, 83 L. J. K. B. 1145, C. A., where authorities are critically reviewed. Some doubt is thrown on *Stocks v. Wilson*, but that case, it is submitted, is clearly distinguishable and correct. [In *Stocks v. Wilson*, the defendant was under a duty to account. This depends on a doctrine of equity which is quite distinct from that of restitution, and it was restitution that was sought (and refused) in *Leslie v. Shell*. Where the doctrine of equity was regarded as limited to bankruptcy proceedings, and if *Stocks v. Wilson* was a case of bankruptcy proceedings (the statement in [1913] 2 K. B. at p. 237 perhaps justifies this assumption), it is supportable, but even so some of the *dicta* in it go too far to make it of much value as a precedent.]

[It is doubtful whether a minor can be adjudicated a bankrupt.²⁰ It seems clear that if, at the time that he incurs a debt, he fraudulently makes an *express* representation to the creditor that he is of full age and, after attaining majority, he is adjudicated a bankrupt, the creditor is entitled to prove in bankruptcy for the debt. Beyond that, the current law is uncertain, though it has been suggested that he can be made bankrupt even while he is a minor for debts incurred for the supply of necessities and for judgment debts.]

A transaction of this kind cannot stand in the way of a subsequent valid contract with another person made by the infant after he has come of age, and the person who first dealt with him on the strength of his representing himself as of age acquires no right to interfere with the performance of the subsequent contract.²¹ This is another proof that the infant's false representation gives no additional force to the transaction as a contract.

2.—Married Women

COMMON LAW DISABILITY

A married woman was capable of binding herself by a contract only 'in respect of and to the extent of her separate property.'²² This limited capacity was created by a statute founded on the practice of the Court of Chancery, which for more than a century had protected married women's separate interests in the manner to be presently mentioned. Except as to separate property the old common law rule still existed till 1935 with greatly diminished importance.

In that year it was wholly abolished for the future, and the statutory amendments and equitable doctrines by which it was mitigated perished with it. But for some time the former law will be applicable to interests created before 1936 and the statement of it is therefore preserved.

According to the ancient common law a married woman has no power of contracting. Any agreement she purports to make is altogether void, and no action will lie against her husband or her self for the breach of it. And the same consequence follows as in the case of infants, namely, that although a married woman is answerable for wrongs committed by her during the coverture, and

²⁰ [I have rewritten the author's original paragraph on this in view of the opinions expressed and the authorities cited in *Williams Bankruptcy* 13th ed. 40-41; *Ringwood Bankruptcy* 17th ed. 1; *Halsbury Laws of England* (2nd ed.) II §15. Sir Frederick Pollock's references were to *Ex parte Jones* (1809) 16 Ves. 265; *Ex parte Bates* (1841) 2 Mont. D. & D. 337; *Ex parte Unity Bank* (1858) 3 De G. & J. 63; and the observations of Jessel M.R., on this last case in 18 Ch. D. at p. 121. To these, I think ought to be added the judicial comments in *Ledie v. Shrell* (note 19, *supra*) and in *Re Soltykoff* [1891] 1 Q. B. 413, 60 L. J. Q. B. 339, as well as other cases cited in the books mentioned above.]

²¹ *Inman v. Inman* (1873) L. R. 13, Eq. 260.

²² *Married Women's Property Act*, 1882, 45 & 46 Vict. c. 75, s. 1, now repealed by the *Law Reform (Married Women and Tortfeasors) Act*, 1935 (25 & 26 Geo. 5 c. 30).

²³ *Per cur. Fairhurst v. Liverpool Adelphi Loan Association* (1854) 9 Ex. 422, 420, 23 J. J. Ex. 164.

may be sued for them jointly with her husband, or separately if she survives him, yet she cannot be sued for a fraud where it is directly connected with an agreement with her, and is parcel of the same transaction, e.g., where the wife has obtained advances from the plaintiff for a third party by means of her guaranty, falsely representing herself as sole,¹¹ but this does not seem to extend to the case of a false representation by which credit is obtained without any appearance of contract on the wife's part.¹² A married woman is not estopped from pleading coverture by having described herself as *sui iuris*.¹³

The fact that a married woman is living and trading apart from her husband does not enable her at common law to contract so as to give a right of action against herself alone.¹⁴ Nor does it make any difference if she is living separate from her husband under an express agreement for separation as no agreement between husband and wife can change their legal capacities and characters.¹⁵

But "a married woman, though incapable of making a contract is capable of having a chose in action conferred upon her, which will survive to her on the death of the husband unless he shall have interferred by doing some act to reduce it into possession" thus she might before the Married Women's Property Act, buy railway stock, and become entitled to sue for dividends jointly with her husband.¹⁶ When a third person assents to hold a sum of money at the wife's disposal but does not pay it over, this is conferring on her a chose in action within the meaning of the rule.¹⁷

During the joint lives of the husband and wife the husband is entitled *tunc mariti* to receive any sum thus due—but if the wife dies before the husband has received it the husband, although his beneficial right remains the same, must in order to receive the money, take out administration to his wife and if he dies without having done so, it is necessary that letters of administration should be taken out to the wife's estate (for such is still the legal character of the money), but the wife's administrator is only a trustee for the representative of the husband.¹⁸ Accordingly the Court of Probate cannot dispense with the double administration, even where the same person is the proper representative of both husband and wife and is also beneficially entitled.¹⁹

¹¹ *Fairbairn's Case*, note 23 ante.

¹² *Wright v. Leonard* 1861 11 C. B. N. S. 258, 30 L. J. C. P. 165, 112 R. R. 554, where the Court was divided, cp *Earley v. Kingsale* [1900] 2 Ch. 585, 601 J. Ch. 725, C. A.

¹³ *Cassam v. Farmer* (1849) 3 Ex. 608, 77 R. R. 786.

¹⁴ *Clayton v. Adams* (1795) 6 I. R. 603.

¹⁵ *Marshall v. Rutton* 1800 8 I. R. 545, 5 R. R. 448.

¹⁶ *Per Cur. Dalton v. Midland Ry Co.* (1853) 13 C. B. 474, 478, 22 L. J. C. P. 177. And see 1 Wms. Saund. 222, 223. On the question what amounts to reduction into possession, see *Williams on Executors*, 12th ed. (1930), 521 seq., *Widgery v. Topper* (1877) 5 Ch. D. 516; 7 Ch. D. 423, 47 L. J. Ch. 550.

¹⁷ *Fleet v. Perrins* (1869) L. R. 3 Q. B. 536; 4 Q. B. 500, 38 L. J. Q. B. 257.

¹⁸ *Per Lord Westbury, Partington v. All-Gen.* (1869) L. R. 4 H. L. 100, 119.

¹⁹ *In the Goods of Harding* (1872) L. R. 2 P. & M. 394.

Inasmuch as according to the view established by modern decisions a promise to pay a debt barred by the Statute of Limitation does not operate by way of post-dating the original contract so as to "draw down the promise" then made, a married woman's general incapacity to contract prevents such a promise, if made by her, from being effectual; and where before the marriage she became joint debtor with another person, that person's acknowledgment after the marriage is also ineffectual, since to bind one's joint debtor an acknowledgment must be such as would have bound him if made by himself."

The rules of law concerning a wife's power to bind her husband by contract, either as his actual or ostensible agent or, in some special circumstances, by a peculiar authority independent of agency, do not fall within the province of this work.

EXCEPTIONS AT COMMON LAW (these are now of no practical importance). The wife of the King of England may sue and be sued as a *feme sole* (Co. Litt. 133 a). This was settled as early as the fourteenth century."

The wife of a person civilly dead may sue and be sued alone (*ib.* 132 b 133 a). The cases dealt with by Coke are such as practically cannot occur at this day, and it seems that the only persons who can now be regarded as civilly dead are persons convicted of felony, and not lawfully at large under any licence."

It appears to be the result of the authorities that the wife of an alien husband who has never been or at least never resided in England may bind herself by contract if she purports to contract as *feme sole*."

"By the custom of London, if a *feme covert*, the wife of a freeman trades by herself in a trade with which her husband does not intermeddle, she may sue and be sued as a *feme sole*, and the husband shall be named only for conformity, and if judgment be given against them she only shall be taken in execution" (Bacon. Abr. Customs of London. D. This custom applies only to the city courts," and even there the formal joinder of the husband is indispensable. But if acted upon in those courts it may be pleaded as matter of defence in the superior courts," though they do not otherwise notice the custom."

¹¹ *Pittam v. Foster* (1823) 1 B. & C. 248, 25 R. R. 385; 1 Wms. Saund. 172. As to the correct explanation of the general rule, see Ch. XIII.

¹² *Ser. Paquin v. Beauclerk* [1806] 1 C. 148, 75 L. J. K. B. 395.

¹³ Y. B. 17 & 18 Ed. III. ed. Pike, 430-434, where Queen Philippa sued the Abbot of Cirencester and another in a *quare impedit*.

¹⁴ Transportation was considered as an abjuration of the realm, which could be determined only by an actual return after the sentence had expired. *Carroll v. Blencow* (1801) 4 Esp. 27. The analogy to Coke's "Civil Death" is disclaimed, *arg. in Ex parte Frank* (1891) 7 Bing. 762. As to alien enemies and their wives see p. 77. It may be doubted whether "civil death" was ever really appropriate as a term of art in English courts except "when a man entereth into religion [i.e., a religious order in England] and is professed". In that case he could make a will and appoint executors (who might be sued as such for his debts, F. N. B. 121, O), and if he did not, his goods could be administered (Litt. s. 230, Co. Litt. 131 b). Bracton, however, speaks of outlawry (426 b) as well as religious profession (301 b) as *mors civilis*. A person under the penalties of *præmonitione*, which include being put out of the King's protection, would, I suppose, be in the same plight as an outlaw. The Roman *mors civilis* was a pure legal fiction, introduced not to create disabilities, but to obviate the inconvenient results of disabilities otherwise created. (Sav. Syst. 2. 164.)

¹⁵ *Barden v. Keenbergh* (1836) 2 M. & W. 61; 6 L. J. Ex. 66. But the question is now of little interest.

¹⁶ *Beard v. Webb* (1800) 2 Bos. & P. 93. Since the Act of 1882 the only effect of the custom, if any, seems to be that a married woman trading in the City of London may be subject to greater personal liability than elsewhere.

¹⁷ *Candell v. Shaw* (1791) 4 T. R. 361.

In certain exceptional cases in which the wife has an adverse interest to her husband she is not incapable of contracting with him. Where a wife had instituted a suit for divorce, and she and her husband had agreed to refer the matters in dispute to arbitration, her next friend not being a party to the agreement, the House of Lords held that under the circumstances of the case she might be regarded as a *feme sole*, that the agreement was not invalid, and that the award was therefore binding.⁴³

The real object of the reference and award in this case having been to fix the terms of a separation, it was later held that the Court would not refuse to enforce an agreement to execute a deed of separation merely because it was made between the husband and wife without the intervention of a trustee.⁴⁴ In the simpler case of an agreement to live apart, with incidental provisions for maintenance, the agreement does not require the intervention of a trustee, and the wife (apart from the Married Women's Property Act, which does not apply) can sue the husband for arrears of maintenance due under it.⁴⁵ It does not follow that in such transactions a married woman has all the powers of a *feme sole*. She has only those which the necessity of the case requires. She is apparently competent to compromise the suit with her husband;⁴⁶ but she cannot, as a term of the compromise bind her real estate (not being settled to her separate use without the acknowledgment required by the Fines and Recoveries Act 1833 (3 & 4 Will 4 c 74)).⁴⁷

STATUTORY EXCEPTIONS OTHER THAN MARRIED WOMEN'S PROPERTY ACTS

The enactments here cited were repealed by the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo 5, c 49), and see now the Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo 5, c 30), they are substantially replaced partly by the last mentioned Act, and partly by Rules of Court. It is not thought useful to give detailed references. The Act of 1935 is summarized, *post*, pp 70-71.

By the Matrimonial Causes Act 1857 constituting the Court for Divorce and Matrimonial Causes (20 & 21 Vict c 85) a wife judicially separated from her husband is to be considered whilst so separated as a *feme sole* for the purposes of (inter alia) contract, and suing and being sued in any civil proceeding (s. 26),⁴⁸ and a wife deserted by her husband who has obtained a protection order is in the same position while the desertion continues (s. 21). This section is so worded as when taken alone to countenance the supposition that the protection order relates back to the date of desertion. It has been decided, however, that it does not enable the wife to maintain an action commenced by her alone before the

⁴³ *Bateman v Countess of Ross* (1813) 1 Dow, 235, 14 R. R. 55.

⁴⁴ *Vanittart v Vanittart* (1858) 4 K. & J. 62, 27 L. J. Ch. 222, but the agreement was not enforceable for other reasons, affd on appeal, 2 De G. & J. 249, 27 L. J. Ch. 289, but no opinion given on this point.

⁴⁵ *McGregor v McGregor* (1898) 21 Q. B. Div. 124; 57 L. J. Q. B. 591.

⁴⁶ *Rosley v Rosley* (1866) 1 R. 2 Sc. & D. 63.

⁴⁷ *Cahill v Cahill* (1883) 8 App. Cas. 420.

⁴⁸ The same consequences follow a *fortiori* on a dissolution of marriage, though there is no express enactment that they shall. *Wilkinson v. Gibson* (1867) L. R. 4 Eq. 162; 36 L. J. Ch. 646, see also, as to the divorced wife's rights, *Wells v. Malbon* (1862) 31 Beav. 48; 31 L. J. Ch. 344; *Fitzgerald v. Chapman* (1875) 1 Ch. D. 563, 45 L. J. Ch. 23; *Burton v. Sturgeon* (1876) 2 Ch. Div. 318, 45 L. J. Ch. 623.

date of the order." Her powers of disposing and contracting apply only to property acquired after the decree for separation or the desertion (or protection order?) as the case may be." These provisions were extended by an amending Act in certain particulars not material to be noticed here (Matrimonial Causes Act, 1858, 21 & 22 Vict. c. 108), and third parties are indemnified as to payments to the wife, and acts done by her with their permission, under an order or decree which is afterwards discharged or reversed (s. 10). The words as to 'suing and being sued' in this section are not confined by the context to matters of property and contract, but are to be liberally construed: a married woman who has obtained a protection order may sue in her own name for a libel.

EQUITABLE DOCTRINE OF SEPARATE ESTATE¹

In the eighteenth century, if not earlier, the Court of Chancery recognized and sanctioned the practice of settling property upon married women to be enjoyed by them for their separate use and free of the husband's interference or control. To this was added towards the end of that century the curious and anomalous device (now abolished for the future: see p. 70) of settling property in trust for a married woman 'without power of anticipation' so that she cannot deal in any way with the income until it is actually payable. During the nineteenth century a doctrine was elaborated, not without difficulty and hesitation, under which a married woman having separate property at her disposal (not subject to the peculiar restraint just mentioned) might bind that property though not herself personally by transactions in the nature of contract. Some account of this doctrine is given for reference in the Appendix (Note C) as being useful, if not necessary, for the full understanding of the modern law.

It should be observed that restraint on anticipation, being allowed only for the purpose of protecting the fund as capital, does not apply to income of the fund when it reaches the married woman's hands or the hands of some person from whom she can immediately demand it. The income so paid or payable is ordinary

¹ *Mullan v. Co. v. Pry* 1861, 10 C. B. N. S. 179, 30 L. J. C. P. 314.

² *Waste v. Marland* 1888, 38 Ch. Div. 135, 57 L. J. Ch. 675. *Hill v. Cooper* [1893] 2 Q. B. 85, 62 L. J. Q. B. 123. C. A. As to the combined effect of this Act and s. 1 of the Married Women's Property Act, 1882, in making property subject to a married woman's disposing power assets for the payment of her debts: see *Re Hughes* [1898] 1 Ch. 520, 67 L. J. Ch. 279, C. A.

Ramsden v. Brearley (187), 1 R. 10 Q. B. 147, 44 L. J. Q. B. 46. 'She can give a valid receipt for a legacy not reduced into possession before the date of the order.' *Re Coward and Adam's Purchase* (1875) L. R. 20 Eq. 179, 44 L. J. Ch. 384.

³ For the history of the doctrine see Appendix Note C.

⁴ For details, see Walter G. Hart. The origin of the restraint upon anticipation. L. Q. R. xl, 221. The exact date is unknown.

⁵ Before the Act of 1882, where a married woman obtained credit by falsely representing herself as a widow, and a fund was settled on her for her separate use for life with a general power of appointment by will, the creditor was held, in the administration of her estate, to have a good claim on that fund as against appointees. *Vaughan v. Landerstegen* (1854) 2 Drew. 363, 408, 100 R. R. 173, 199.

separate property, and therefore on principle not exempt from the subsequent claims, equitable or statutory, of the married woman's creditors;¹¹ but it cannot be made liable to a previous judgment,¹² nor will a standing capital charge on the fund attach to instalments of income as they fall due¹³

THE MARRIED WOMEN'S PROPERTY ACTS, 1882-1935

The provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) extended by the amending Act of 1893 and now superseded as to future marriages by the Act of 1935 (25 & 26 Geo. 5, c. 30) amounted in their time to a new body of law, and they are still operative as regards settlements made before 1936. The law, as it now stands, is to this effect.

A married woman is now fully capable of acquiring and dealing with property incurring obligations in contract and tort and suing and being sued, and also subject to bankruptcy law¹⁴ and to the enforcement of judgments and orders.¹⁵ From Jan. 1, 1936, there is no such thing as the old separate estate: but a married woman's property is held and can be dealt with like a man's, and any attempted restriction that might not be annexed in a man's case is void.¹⁶ But any other special trusts created in favour of a married woman by will, settlement or otherwise appear to remain unaffected so far as they do not contain any such forbidden restriction.¹⁷ All property which, before the passing of the Act, was her separate property, or which belongs to her at the date of her marriage where she marries after the passing of the Act, or which is acquired by, or devolves upon her after the passing of the Act, shall belong to her as if she were a *feme sole*, and it may be disposed of accordingly. This does not affect any restriction upon anticipation or alienation created by any Act passed before the passing of the Act of 1935 (Aug. 2nd, 1935), or in any instrument

¹¹ See *Hood Barrs v. Harot* [1864] 1 C. 173, 65 L. J. Q. B. 352; *Whitley v. Edwards* [1866] 2 Q. B. 48, 65 L. J. Q. B. 457. C. A., this principle seems to have been overlooked by the C. A. in construing the Act of 1893 in *Barnett v. Howard* [1900] 2 Q. B. 784, 69 L. J. Q. B. 955, which however has been followed and confirmed in *Wood v. Lewis* [1914] 1 K. B. 73, 83 L. J. K. B. 1046, C. A.

¹² *Bolton v. Gidley* [1905] 1 C. 48, 74 L. J. K. B. 430, approving *Whitley v. Edwards*, note ¹¹ above.

¹³ *Re Ruth* [1923] 1 Ch. 50, 38 Times L. R. 460, C. A. charges on late enemy nationals under Peace Treaty, having statutory effect. The restraint is not a merely personal disability but a condition of the trust on which the separate property is held.

¹⁴ See *Re a Debtor* [1938] Ch. 604, 107 L. J. Ch. 321.

¹⁵ Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1. The Act was passed without discussion and with very little notice at the end of the session. [But it was founded on recommendations made in 1934 by the Lord Chancellor's Law Revision Committee after careful consideration. See the Committee's Fourth Interim Report, Cmd. 4770 (Dec. 1934).]

¹⁶ S. 2, with a saving for the execution of duties or powers already created on which it is needless to dwell here.

¹⁷ S. 19 of the Act of 1882, not repealed by the Act of 1935, "prevents the previous enactment [i.e., s. 5 of the Act of 1882] from interfering with any settlement which would have bound the property if the Act had not passed": *Cotton L.J. Hancock v. Hancock* (1888) 38 Ch. Div. 78, 90; 57 L. J. Ch. 396. But this seems to be now of little practical importance.

executed before Jan. 1st, 1936."⁶⁶ The liability of a husband for any contract entered into, or debt or obligation incurred, by her before marriage is abolished (s. 3).]

OLD LAW OF SEPARATE ESTATE

The rest of this section states the law of separate estate as it stood before 1936. Cases governed by that law will continue to occur for some time.

Subject to any settlement," a married woman could before 1936 bind herself by contract "in respect of and to the extent of her separate property," and sue and be sued alone.⁶⁷

Damages and costs, if recovered by her, become her separate property; if against her, are payable out of her separate property and not otherwise.⁶⁸ A married woman trading alone can be made bankrupt in respect of her separate property.⁶⁹

A contract made by a married woman otherwise than as agent⁷⁰

(i) Is deemed to be made with respect to and to bind her separate property," and, if made since 5 Dec. 1893, whether or not she has any separate property at the date of contract.⁷¹

(ii) If so made and binding, binds her after acquired separate property.⁷²

A married woman's separate property is liable for her ante-nuptial debts and obligations.⁷³ She is also liable at common law for such debts, and judgment may go against her personally.⁷⁴ She cannot avoid this liability by settling the property on herself without power of anticipation.⁷⁵ As to women married before

⁶⁶ [See *Re Meredith's Trusts* [1948] Ch 806, 107 L. J. Ch. 302. Further qualifications with respect to the operative dates of instruments relating to restraint on alienation are contained in S. 2, sub-sect. 3.]

⁶⁷ See *Stonor's Trusts* 1883 24 Ch. Div. 145, 52 L. J. Ch. 776.

⁶⁸ As to liability on causes independent of contract *Whitaker v. Kershaw* (1890) 45 Ch. Div. 320, 60 L. J. Ch. 9. The general words of s. 1 (1) do not give any greater power of disposal than is given by the specific words of ss. 2 and 5, with which s. 1 must be read. *Re Lane, Mansfield* 1886 13 Ch. Div. 12, 62 L. T. 15.

⁶⁹ M. W. P. Act 1882 s. 1, sub-s. 2.

⁷⁰ S. 1, sub-s. 3. An unexecuted general power of appointment is not "separate property," and a married woman cannot be compelled to execute such a power for the benefit of her creditors. *Ex parte Gilchrist* (1886) 17 Q. B. Div. 521; 55 L. J. Q. B. 578. S. 19 does not prevent property to which she is entitled under a settlement, without restraint on anticipation from passing to the trustee in bankruptcy. *Ex parte Boyd* (1888) 21 Q. B. Div. 264, 57 L. J. Q. B. 553.

⁷¹ These words do not affect the authority of a married woman living with her husband to pledge his credit, or the presumption that she deals on his credit alone. *Pagani v. Beauchamp* [1906] A. C. 148, 75 L. J. K. B. 395, and the other party's knowledge is immaterial if there is no misrepresentation. *ibid.* The H. L. was equally divided.

⁷² Formerly there was no such presumption unless she was living apart from her husband. See Appendix, Note 3.

⁷³ Married Women's Property Act, 1893 (56 & 57 Vict. c. 63). A contract made before the Act cannot be brought within it by subsequent acknowledgment. *Re Wheeler* [1904] 2 Ch. 66, 73 L. J. Ch. 576.

⁷⁴ 56 & 57 Vict. c. 63, ss. 1, 4.

⁷⁵ S. 13 of the M. W. P. Act, 1882. This liability is at least doubtful in cases not under the Act. See Appendix, Note 3. As to the Act of 1870, *Asford v. Rend* (1889) 22 Q. B. D. 548; 58 L. J. Q. B. 290. But all this will soon be obsolete.

⁷⁶ *Robinson, King & Co. v. Lyns* [1894] 2 Q. B. 577; 63 L. J. Q. B. 759. ⁷⁷ S. 19.

January 1, 1883, such liability applies only to separate property acquired by them under the Act."⁷

The Act of 1882 contains other provisions (henceforth mostly obsolete) as to the effect of the execution of a general power by will by married women,¹² the title to stocks and other investments registered in a married woman's name, either solely or jointly,¹³ the effecting of life assurances by a married woman, or by either husband or wife for the benefit of the family,¹⁴ procedure for the protection of separate property,¹⁵ and other matters which belong more to the law of Property than to the law of Contract.

It is not expressly stated by the principal Act whether on the termination of the coverture by the death of the husband, or by divorce, a married woman's debts contracted during the coverture with respect to her separate property do or not become her personal debts, but it has been assumed that they do,¹⁶ and the Act of 1893 expressly makes this the rule for contracts subsequent to its date.¹⁷ If not the only remedy would be against her separate property which existed as such during the coverture, and was not subject to restraint on anticipation,¹⁸ so far as it could still be identified and followed.

The Act did not remove the effects of a restraint on anticipation. A married woman's creditor is not enabled to have execution or any incidental remedies against property subject to such restraint,¹⁹ though this affects only the remedy, not the cause of action.²⁰ But the Act of 1893 gives power to order costs to be paid out of such property²¹ in any action or proceeding instituted by or on behalf of a married woman.²²

It was settled under the Act of 1882, after some difference of judicial opinions, that income of separate property subject to restraint on anticipation is when paid or accrued due free money, and liable to satisfy a judgment not of prior date to the date of such income becoming payable.²³ It is now held that s. 1 of the Act of 1893 has the effect of abrogating this rule, and

⁷ s. 6 & 57 Vict. c. 63, s. 1, 4.

¹² *Re Fuldusck* [1890] 1 Ch. 7, 78 L. J. Ch. 153, C. A.

¹³ s. 6, 10. ¹⁴ s. 11. ¹⁵ s. 12.

¹⁶ *Harrison v. Harrison* 1888, 13 P. Div. 180. *Leak v. Driffield* 1889, 24 Q. B. D. 98.

¹⁷ s. 6 & 57 Vict. c. 63, s. 1, 4.

¹⁸ *Pellon Bros. v. Harrison* [1891] 2 Q. B. 422, 60 L. J. Q. B. 74, C. A.

¹⁹ *Draycott v. Harrison* 1886, 17 Q. B. D. 147. But he may when the restraint is removed by the husband's death. *Briggs v. Ryan* [1891] 1 Ch. 717, 68 L. J. Ch. 663, at any rate a trustee in bankruptcy may. ²⁰

²¹ *Whittaker v. Kerzhaw* 1890, 45 Ch. Div. 320, 327, 60 L. J. Ch. 9.

²² s. 6 & 57 Vict. c. 63, s. 2. S. 1 does not make such property liable to satisfy a contract. See the proviso.

²³ *Hood Barrs v. Cathcart* [1894] 3 Ch. 376, 63 L. J. Ch. 793, C. A., approved, *Hood Barrs v. Heriot* [1897] A. C. 177, 66 L. J. Q. B. 356. This does not apply to motions, appeals, or other steps taken in a cause by a married woman who is a defendant, but it does apply to a counterclaim by her. *Hood Barrs v. Heriot* [1895] 1 Q. B. 873, 64 L. J. Q. B. 520. The burden is on the married woman to show why such an order should not be made, but it is not a matter of course. *Pauley v. Pauley* [1905] 1 Ch. 593, 74 L. J. Ch. 344.

²⁴ *Hood Barrs v. Heriot* [1896] A. C. 174, 65 L. J. Q. B. 352.

protecting the income actually payable from separate property which was subject to restraint on anticipation at the date of the contract, even if the restraint on the capital has been removed by the cessation of the coverture before the date of the judgment.¹⁰ This result seems to be foreign to the intention of the Act.

A married woman cannot free herself from a restraint on anticipation attached to any property held for her separate use by any act of her own, whether in the nature of admission, estoppel, or otherwise.¹¹

Where the surviving husband of a married woman takes her separate estate *iure mariti*, he is at once her "legal personal representative" for the purposes of the Act, and liable to her creditors to the extent of that separate estate.¹²

On the other hand the Act does not exclude such equitable rights and remedies against a married woman's separate estate as were previously recognized. Where a married woman carries on a separate business, her husband can sue her for advances made during the coverture for the purposes of that business,¹³ on the general principle that in respect of her separate estate she is treated as a *feme sole*. And it may still be possible in some cases not within the Act to enforce a married woman's contract by means of the equitable doctrine of imperfect exercise of a power.¹⁴

With regard to a husband's liability for his wife's ante-nuptial debts, the Court of Appeal has decided in a considered judgment that it is distinct, and not merely a joint liability with the wife's separate estate; but that, for the purposes of the Statute of Limitation, there is not a distinct cause of action accruing against the husband at the date of the marriage.¹⁵

3.—Lunatics and Drunken Persons

It will be convenient to consider these causes of disability together, since in our modern law drunken men (so far as their capacity of contracting is affected at all) are on the same footing as lunatics.¹⁶

¹⁰ *Barnett v. Howard* [1900] 2 Q. B. 784; 69 L. J. Q. B. 955; *Wood v. Lewis* [1914] 3 K. B. 73; 83 L. J. K. B. 1046, C. A., see p. 79. [*Re Meredith's Trusts* [1936] Ch. 806; 107 L. J. Ch. 302, is a decision on the interpretation of the Act of 1935.]

¹¹ *Baleman v. Faber* [1898] 1 Ch. 144; 67 L. J. Ch. 130, C. A. But she can bind her free separate property by a covenant not to sue in respect of dealings with her restrained property, and the measure of damages in a counterclaim on her covenant may be the exact sum she would recover on the principal claim: *Sprange v. Lee* [1908] 1 Ch. 424; 77 L. J. Ch. 274.

¹² S. 23 of the principal Act, as applied in *Surman v. Wharton* [1891] 1 Q. B. 491; 60 L. J. Q. B. 233.

¹³ *Butler v. Butler* (1885) 16 Q. B. Div. 374; 55 L. J. Q. B. 55.

¹⁴ See per Fry L. J. *Ex parte Gilchrist* (1886) 17 Q. B. Div. at 532.

¹⁵ *Back v. Pierce* (1889) 23 Q. B. Div. 316; 58 L. J. Q. B. 516.

¹⁶ [American law is broadly to the same effect as English law: Williston Contracts §§ 249—263. There is some uncertainty as to the position of a *bona fide* purchaser of property from A. who acquired the property from B. under a contract which, as between A. and B., is voidable for B.'s insanity or intoxication: §§ 252, 261. In English law, the question seems to be an open one with respect to the holder in due course of a negotiable instrument: see Theobald, Lunacy (1924), 216.]

The old law as to a lunatic's acts was that he could not be admitted to avoid them himself, though in certain cases the Crown, and in other cases his heir could.* The fact of a defendant having been found lunatic by inquisition was not conclusive, as regards acts done before the date of the inquisition, as against a plaintiff who was not there present.* But a lunatic so found by inquisition cannot deal with his property by deed, even in a lucid interval, while the inquisition is in force.* A lunatic not so found is capable of contracting (among other acts) during any lucid intervals.* The marriage of a lunatic is void, and the same degree of sanity is required for marriage as for making a will or for any other purpose, though the burden of proof is on the party alleging insanity.*

It is equally settled that a lunatic or his estate may be liable *quasi ex contractu* for necessities supplied to him in good faith;* and this applies to all expenses necessarily incurred for the protection of his person or estate, such as the cost of the proceedings in lunacy.* A person who supplies necessities to a lunatic or provides money to be expended in necessities knowing him to be such can have an action against the lunatic if he incurred the expense with the intention, at the time, that it should be repaid. The circumstances must be such as to justify the Court in implying an obligation to repay, there is no doubt that such an obligation may exist in a proper case.*

[The Sale of Goods Act, 1893 (36 & 37 Vict. c. 71) s. 2 already quoted in connection with infants (p. 57) applies also to lunatics and drunken persons.* The same problems arise with respect to (1) whether the seller must prove that the goods were necessities both at the time of sale and at the time of delivery, (2) whether, if the goods are sold, but delivery of them is refused by the buyer, he is liable.* As to the lunatic, three years before the Sale of Goods Act, the Court of Appeal decided in *Re Rhodes* that if necessities are supplied to a lunatic, the law implies an obligation on his part

* See the judgment of Fry L. J. in *Imperial Loan Co. v. Stone* [1892] 1 Q. B. at 601.

* *Hall v. Warren* 1804, 9 Ves. 605, 609, 7 R. R. at 308.

* *Re Walker* [1905] 1 Ch. 160, 74 L. J. Ch. 86, C. A.

* *Beverly's case* 1603, 4 Co. Rep. 123 b. *Hall v. Warren*, note * above.

* *Hawcock v. Peaty* [1867] 1 R. & P. D. 335, 341, with which *Durham v. Durham* (1885) 10 P. D. 80, does not conflict on this point. The Marriage of Lunatics Act, 1742 (15 Geo. 2. c. 40) is rep. by the Stat. Law Revision Act, 1873 (36 & 37 Vict. c. 91).

* *Brockwell v. Bullock* 1880, 22 Q. B. Div. 567, *Bagster v. Earl of Portsmouth* (1826) 5 B. & C. 170, s. c. more fully, nom. *Baxter v. Earl P.*, 5 D. & R. 614.

* *Williams v. Wentworth* 1842, 5 Beav. 325, *Siedman v. Hart* 1854 Kay, 607; 23 L. J. Ch. 908; 101 R. R. 764.

* *Re Rhodes* (1890) 44 Ch. Div. 94, 59 L. J. Ch. 298.

* [The material parts of s. 2 are: "Where necessities are sold and delivered to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such person, and to his actual requirements at the time of the sale and delivery."]

* [These questions are discussed in detail in 58 L. Q. R. 1042, 82-95, and the results are summarized here.]

1 [(1890) 44 Ch. D. 94; 59 L. J. Ch. 298.]

to pay for them out of his own property. Both Kay J. and the Court of Appeal, in affirming his decision, were emphatic that the obligation was quasi-contractual, not contractual, and in so holding they were following a long line of decisions.² As the essence of quasi-contractual liability would be the delivery of the goods, it follows, first, that it would be enough to prove that the things were necessaries at the time of delivery and secondly, that a seller of goods which are necessaries could recover nothing if the lunatic would not or did not, get delivery of them. Thus, it is submitted, is the correct interpretation of the Sale of Goods Act. As to the drunken person, the same applies, but by a slightly different process of reasoning. We have been unable to trace any direct decision concerning the drunkard on the points raised but in *Gore v Gibson*³ Pollock C.B. and Alderson B. said *obiter* that a drunkard is liable on an implied contract (*i.e.*, quasi-contract) for necessaries supplied and, although they cited no authority, they seem to have been expressing what they regarded as unquestioned law.⁴ In *Re Rhodes* (*supra*) the general proposition was laid down that "whenever necessaries are supplied to a person who by reason of disability cannot himself contract the law implies an obligation on the part of such person to pay for such necessaries out of his own property. The decision itself related to lunacy, but the rule would include drunken persons."

A husband is liable for necessaries supplied to his wife while he is lunatic for the wife's authority to pledge his credit for necessaries is not a mere agency but springs from the relation of husband and wife and is not revoked by the husband's insanity.⁵ In the same way drunkenness or lunacy would be no answer to an action for money had and received or for the price of goods furnished to a drunken or insane man and kept by him after he had recovered his reason. In this last case, however, his conduct in keeping the goods would be evidence of a new contract to pay for them.

There is also express authority (which one would think hardly necessary) to show that contracts made by a man of sound mind who afterwards becomes lunatic are not invalidated by the lunacy.⁶ It seems that an agency is determined by the principal becoming insane except as to persons who deal in good faith with the agent in ignorance of the principal's insanity.⁷

² [The older cases are cited in Wood Renton, *Lunacy* (1896), 10, 15—16.]

³ [(1845) 3 M. & W. 263.]

⁴ [*Hamilton v. Gauger* (1859) 5 Jur. N.S. 1108, 5 H. & N. 50 (the former is the better report, such as it is), is possibly a direct authority for what is stated in *Gore v. Gibson*, but nothing certain on this point can be elicited.]

⁵ [(1890) 44 Ch. D. at 105, per Cotton L.J., who said in the next paragraph "we all agree with the view that I have thus expressed"].

⁶ *Read v. Legard* (1851) 6 Ex. 696, 30 L. J. Ex. 309, 86 R. R. 418.

⁷ *Gore v. Gibson* (1845) 13 M. & W. 623, 14 L. J. Ex. 151, 67 R. R. 702.

⁸ *Queen v. Davies* (1747-8), 1 Ves. Sr. 82.

⁹ See *Druce v. Aunn* (1879) 4 Q. B. Div. 661, 46 L. J. Q. B. 591.

The general rule as to the contract of a lunatic (at all events if not so found by inquisition) or drunken man who by reason of lunacy or drunkenness is not capable of understanding its terms or forming a rational judgment of its effect on his interests is that such a contract is voidable at his option but only if his state is known to the other party. The defendant who sets up his own incapacity as a defence must prove not only that incapacity but the plaintiff's knowledge of it at the date of the contract.*

In *Molton v Camroux*¹⁰ the action was brought by administrators to recover the money paid by the intestate to an assurance and annuity society as the price of two annuities determinable with his life. The intestate was of unsound mind at the date of the purchase but the transactions were fair and in the ordinary course of business, and his insanity was not known to the society. It was held that the money could not be recovered, the rule being laid down in the Exchequer Chamber in these terms. The modern cases show that when that state of mind was unknown to the other contracting party and no advantage was taken of the lunatic the defence cannot prevail especially where the contract is not merely executory but executed in the whole or in part and the parties cannot be restored altogether to their original positions.

The context shows that the statement was considered equally applicable to lunacy and drunkenness and the law thus stated involves though it does not expressly enounce the proposition that the contract of a lunatic or drunken man is not void but at most voidable. The general rules as to the rescission of a voidable contract are then applicable and among others the rule that it must be rescinded, if at all before it has been executed so that the former state of things cannot be restored which is the point actually decided. The decision itself was fully accepted and acted on¹¹ though the merely voluntary acts of a lunatic (e.g. a voluntary disentailing deed (a class of acts with which we are not here concerned) remain invalid. The complete judicial interpretation of the result of *Molton v Camroux* was given in *Matthews v Baxter*. The declaration was for breach of contract in not com-

¹⁰ *Molton v Camroux* in Ex Ch 1848 2 Ex 487, 4 Ex 17, 18 J J Ex 68, 350; *Imperial Loan Co v Stone* [1892] 1 Q B 590, 61 L J Q B 449 (C A) [*Tork Glass Co Ltd v Jubb* 1921, 42 L J R 1 (C A)]. The same principle had long before been acted upon in equity but without deciding whether there was a contract at law. *Niell v Morley* 1804 9 Ves 478. The rule is apparently peculiar to the Common Law and has been impugned by a learned civilian as unjust to the lunatic. Prof Goudy, *Contracts by Lunatics*, L Q R xvii 147. See contra Mr Rankine Wilson, *Lunacy in relation to Contract Tort and Crime*, L Q R xviii, 21. As to the Roman-Dutch law of Natal, *Molynux v Natal Land, &c, Co* [1905] A C 555. In British India a person of unsound mind is incapable of contracting. I C A 35 10, 11, 12. *Mohori Bibee v Dharmodas Ghose* (1903) L R 32 I A 114.

¹¹ *Beavan v M Donnell* (1834) 9 Ex 309, 23 L J Ex 94, *Price v Berrington* (1850-1) 3 Mac & G 486, 495 revg s c 7 Ha 394, 87 R R 157, *Elliot v Ince* (1857) 7 D M C 475, 488, 26 L J Ch 821.

¹² *Elliot v Ince*, last note.

¹³ Note 10, *supra*.

¹⁴ 1873, L R 5 Ex 132, 42 L J Ex 73.

pleting a purchase: plea, that at the time of making the alleged contract the defendant was so drunk as to be incapable of transacting business or knowing what he was about, as the plaintiff well knew: replication, that after the defendant became sober and able to transact business he ratified and confirmed the contract. As a merely void agreement cannot be ratified, this neatly raised the question whether the contract were void or only voidable: the Court held that it was only voidable, and the replication therefore good.

In *Imperial Loan Co. v. Stone*¹² a defendant sued on a promissory note set up the defence of insanity at the time of making the note. The jury found that he was insane when he signed the note, and could not agree whether the plaintiff's agent, then present, knew of his insanity or not. It was held that this could not be taken as a verdict for the defendant, but there must be a new trial. The Court was unanimous, and the decision may be taken as finally settling the law if there was still any room for doubt. It also shows that a distinction formerly suggested between executed and executory contracts is not tenable.

The special doctrine of our Courts with regard to partnership (which is a continuing contract) is quite in accordance with this: it has long been established that the insanity of a partner does not of itself operate as a dissolution of the partnership, but is only a ground for dissolution by the Court.

It is to be noted that the existence of partial delusions does not necessarily amount to insanity for the purposes of this rule.

The judge or jury, as the case may be, must in every case consider the practical question whether the party was incompetent to manage his own affairs in the matter in hand.*

4.—Convicts; Alien Enemies

At common law convicted felons (as also outlaws) could not sue, but remained liable to be sued, on contracts made by them during outlawry or conviction.† Since the Forfeiture Act, 1870, which abolished forfeitures for treason and felony, convicts are incapable of suing or making any contracts, except while they are lawfully at large under any licence.‡

An enemy alien¹³ is disabled from suing in our English Courts during the state of war without licence from the Crown: such licence is implied in permission to reside here, given in regular course, and extends (as to her own rights) to the wife of an enemy

¹² [1892] 1 Q. B. 599; 61 L. J. Q. B. 449, C. A. It does not appear from the argument as reported how counsel for the defendant dealt with *Molton v. Camroux*, which was binding on the court.

¹³ *Jenkins v. Morris* (1886) 14 Ch. Div. 674; compare remark of Bramwell J. in *Drew v. Mann* (1879) 4 Q. B. Div. at 669; 48 L. J. Q. B. 591.

¹⁷ *Dicey on Parties*, 4.

¹⁸ 33 & 34 Vict. c. 23, ss. 8, 30.

¹⁹ [For details as to who are enemy aliens and as to their procedural rights, see McNair, *Legal Effects of War* (2nd ed.), ch. 2 and 3].

resident abroad if she is duly registered here." But there is nothing to prevent enemies from binding themselves by contract during war between their country and England," not from enforcing such a contract after the war has ceased." {Where a state at war with Great Britain has invaded the territory of a state at peace with Great Britain, the question arises whether a person resident or domiciled in that territory is under the same procedural disabilities as an enemy alien. The answer to this depends on whether the invasion is no more than mere temporary occupation or amounts to subjugation at any rate for the time being. In the former case, the person in question is not disabled from suing in the English Courts, in the latter he is.¹ An enemy alien, wherever he is, can be sued here and, if the action goes against him, he can appeal.^{2(b)}

PART 2

We now come to the extensions by special institutions of the ordinary power of making contracts. And first of agency.

1.—Agency

We have not here to do with the relations created between principal and agent³ by agency regarded as a species of contract, but only with the manner in which rights and duties accrue to the principal through the dealings of the agent. We must also distinguish cases of real agency from those where the agency is apparent only, and we shall further notice, for the sake of com-

¹ *Aliens Restriction Act 1914* s. 4 & 5 (Geo. 5, c. 10). *Thorn and East, Princess v. Moffat* [1915] 1 Ch. 51. It is immaterial when the cause of action arose, the disability being personal. *Le Bre, Popidon* 1804 1 East 302. — R. R. 619. Internment does not diminish the beneficial effect of registration. *Schaffens v. Goldberg* [1916] 1 K. B. 283, 85 L. J. K. B. 173, C. A. [In consequence of the present war a mass of statutory Rules and Orders have been issued under the Act of 1914. The same applies to the Trading with the Enemy Act 1914, 2 & 3 (Geo. 5, c. 18), an Act still more important for the purposes of the law of Contract. All this emergency legislation can be found in Butterworth's Emergency Legislation Service, and Keir and Rogers' Solicitors' Handbook of War Legislation. Supplements are issued to both these publications.]

² And being sued thereon. *Hauer v. Teufenfeld* [1916] 1 K. B. 143, 85 L. J. K. B. 323, affd. [1916] 2 K. B. 707, 85 L. J. K. B. 1598.

³ *De Wahl v. Brauns* 1856 5 H. & N. 178, 25 L. J. Ex. 343. The surmise there that the Statute of Limitation continues to run during the war time does not seem well founded, see I. Q. R. xx 168. [See W. F. Trotter, Law of Contract during and after War, 4th ed. 1940, 88-90, where the learned author examines the older English cases and shows that they are not of much value now. The point is also discussed in McNair, Legal Effects of War, 2nd ed., 73-81, where the dearth of authority is admitted and the effect of the Limitation Act 1939, 2 & 3 (Geo. 6, c. 21) is considered.]

⁴ *Soerfacht v. O. v. Van I den Ghe Maatschappij* [1943] A. C. 203, where the House of Lords held that the Netherlands were in the category of subjugation during the present war. Lord Porter at p. 240 suggested that the distinction between the two categories turns upon the time that the occupation endures, the amount of control exercised and the extent to which the home government is superseded. See, too, Lord Greene, M.R. in *Re Anglo-International Bank Ltd* [1943] Ch. 233, 240-243.]

⁵ *Porter v. Freudenberg* [1915] 1 K. B. 857 (C. A.), 84 L. J. K. B. 1001.

⁶ [The leading monograph is Bowstead, Agency, 8th ed. 1932. American law is treated in Williston, Contracts, §§ 273-315, in which are also included references to the Restatement of Agency so far as it relates to contract.]

⁷ "A person employed to do any act for another or to represent another in dealings with third persons." I. C. A. s. 182. Definition is hardly necessary for English-speaking readers.

pleteness, the position of the true or apparent agent as regards third persons.

A person who *contracts or professes to contract on behalf of a principal* may be in any one of the following positions

1 Agent having authority (whether at the time or by subsequent ratification) to bind his principal

(A) known to be an agent

(i) for a principal named,

(ii) for a principal not named,

(B) not known to be an agent

2 Holding himself out as an agent, but not having authority to bind his principal

(A) where a principal is named

(i) who might be bound but does not in fact authorize or ratify the contract,

(ii) who in law cannot be bound,

(B) where the alleged principal is not named

It has lately become common in many kinds of business to misapply the term "agent" to retailers who under special terms of agreement with the wholesale vendors act within certain limits very much as if they were agents. "Many difficulties have arisen from this habit" *W T Lamb and Sons v Goring Brick Co* [1932] 1 K B 710 717 101 L J K B 214 per Scrutton L.]

1 As a rule an agent may be appointed without any special formality though an agent to execute a deed must himself be appointed by deed and in certain cases the appointment is required by the Statute of Frauds (1677 (29 Car 2 c 3) to be in writing. Revocation of an agent's authority takes place either by the principal's actual withdrawal of his will to be represented by the agent (which may be known either by express declaration or by conduct manifesting the same intention) or by his dying or ceasing to be *vitae* and thus becoming incapable of continuing it. In these last cases the authority is said to be revoked by the act of the law. "The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him or, so far as regards third persons, before it becomes known to them." It is held in England but anomalously, that this rule does not apply to revocation by the death of the principal.¹⁴ It does

¹⁴ Since the cases of *Calder v Dobell*, *Frost v Murton* and *Hutchinson v Tatham* see following notes the true leading distinction seems to be whether the agent is known to be an agent or not, rather than whether the principal is named or not.

¹⁵ I C A s 208, (p. Story on Agency § 470. *Iruman v Loder* 1840 11 A & L 589, 54 R R 451.

¹⁶ *Blades v Frost* 1829 9 B & C 167 32 R R 620. *Contra* I C A s 208 (Illustr. Code Nap 2008 2009, and German Civil Code, ss 167—171, and see Kent, Comm 2 646. [In the U S A, death of the principal, though unknown to the agent or to the person with whom he deals, revokes the agent's power. Williston, Contracts, 818. Restatement of Agency, §§ 120, 121. But in several jurisdictions, the hardship of this rule has led to decisions that, unless the act in question had to be done in the principal's name, notice of the principal's death is necessary, and in some States there are statutes to this effect. Williston, *ib* 818—819.] The same rule was applied to the dissolution of a company in *Salton v New Boston Cycle Co* [1900] 1 Ch 43; 69 L J Ch. 20. But the agent may be liable on an implied warranty of his authority see p 87.

apply in the case of the principal becoming insane, and it may perhaps yet be decided that in the case of death the principal's estate is liable to the other party for the actual loss incurred by the principal's representation—which, as regards him, was a continuing one at the date of the contract—that the agent was authorized²⁷

Ratification must in every case be within a reasonable time, and where a time is expressly limited within which an act must be done, and an unauthorized person purports to do it on behalf of the principal within that time, a ratification after the time has expired will not serve²⁸

Authority conferred by ratification relates back, as against the other party as well as the principal to the date of the act done by the agent²⁹ But if an agent's acceptance of an offer is made expressly subject to ratification it is not conclusive and until it is ratified the proposer is free to revoke the offer

In all cases where there is an authorized agent dealing on behalf of a real principal, the intention of the parties determines whether the agent, or the principal or both are to be liable on the contract and entitled to enforce it The question is to whom credit was really given And the general rules laid down on the subject furnish only provisional answers which may be displaced (subject to the rules as to admissibility of evidence) by proof of a contrary intention

A When the agent is known to be an agent a contract is made and knowingly made by the other party with the principal on which the principal is the proper person to sue and be sued

And when the principal is named at the time then there is *prima facie* no contract with the agent but when the principal is not named then *prima facie* the agent though known to be an agent does bind himself personally the other party not being presumed to give credit exclusively to an unknown principal³⁰

²⁷ *Drew v. Nunn* (1879) 4 Q. B. Div. 181; see per Brett L. J. at 168 [and the discussion of this case in Salmond & Wintell *Contracts* 496, 497] In the U.S.A. insanity of the principal does not revoke the agent's powers until he notices unless the principal has been adjudicated a lunatic or his insanity is such as to deprive him of consensual capacity [Williston *Contracts* 1120]

²⁸ *Dibbin v. Dobbie* (1866) 2 Ch. 148, 6 L. J. Ch. 723

²⁹ *Bolton Partner v. Lambert* (1901) 13 C. L. Div. 517, 76 L. J. C. L. 425; see however the note on this case in Fry on Specific Performance and Fleming v. Bank of New Zealand (1906) 1 A.C. 577, 307, 69 L. J. P. C. 120. *Re Lufmann* (1869) 2 Q. B. 66, 68 L. J. Q. B. 2. Actual ratification by an undisclosed principal see pp. 83, 84.

³⁰ *Watson v. Daer* [1931] 1 Ch. 155, 100 L. J. Ch. 157 on rather complicated facts.
¹ *Story on Agency* §§ 271, 272, 288. *Thompson v. Deane* (1829) 9 B. & C. 78, 32 R.R. 578. *Caldwell v. Dobell* (1871) 1 R. C. P. 486, 40 L. J. C. P. 224. [See too *International Ry. Co. v. Niagara &c.* [1941] A.C. 328].

³¹ Circumstances putting the other party on inquiry will not do for the doctrine of constructive notice does not extend to commercial matters. *Greer v. Downs Supply Co.* [1927] 2 K. B. 28, 96 L. J. K. B. 534, C. A. The general principle was already settled.

³² But one who dealt with an agent known to be such cannot set off against the principal's claim a debt due to him from the agent. If he has employed an agent on his own part, that agent's knowledge is for this purpose treated as the employer's own and thus even though the knowledge was not acquired in the course of the particular employment. *Dresser v. Norwood* (1864) Lx. Ch. 17 C. B. N. S. 466, 34 L. J. C. P. 48. revg s.c. 14 C. B. N. S. 574, 32 L. J. C. P. 201. *Contra*, 1 C. A. 229. *Qu.* by design or accident?

But when the agent would not *prima facie* be a contracting party in person he may become so in various ways. Thus he is personally liable if he expressly undertakes to be so: "such an undertaking may be inferred from the general construction of a contract in writing, and is always inferred when the agent contracts in his own name without qualification," though the principal is not the less also liable whether named at the time or not," or if he himself has an interest in the subject-matter of the contract, as in the case of an auctioneer.²⁶ And when the agent is dealing in goods for a merchant resident abroad, it is held on the ground of mercantile usage and convenience that without evidence of express authority to that effect the commission agent cannot pledge his foreign constituent's credit, and therefore contracts in person.²⁷ When a deed is executed by an agent as such but purports to be the deed of the agent and not of the principal, then the principal cannot sue or be sued upon it at law, by reason of the technical rule that those persons only can sue or be sued upon an indenture who are named or described in it as parties.²⁸ But where a trustee contracts in his own name alone, even under seal, and afterwards repudiates the trust, the beneficiary can enforce the contract, making him a defendant, without a separate application to the Court for authority to sue in the trustee's name.²⁹ And it is also held that a party who takes a deed under seal from an agent in the agent's own name elects to charge the agent alone.³⁰ A similar rule has been supposed to exist as to negotiable instruments: but modern decisions seem to show that when an agent is in a position to accept bills so as to bind his principal, the principal is liable though the agent signs not in the principal's name but in his own, or, it would

²⁶ Story on Agency, § 200; Smith Merc. Law (13th ed. 1931) 203.

²⁷ See *Faure v. Fenton* (1870) L. R. 5 Ex. 169; 39 L. J. Ex. 107.

²⁸ *Huggins v. Senior* (1841) 8 M. & W. 834; 58 R. R. 884, "the law there laid down goes to superadd the liability of the agent, not to take away that of the principal"; *Calder v. Dobell* (1871) L. R. 6 C. P. 484; 40 L. J. C. P. 224.

²⁹ 2 Sm. L. C. 309. As to an auctioneer's personal liability for non-delivery to a purchaser of goods bought at the auction: *Woolfe v. Horne* (1877) 2 Q. B. D. 355; 46 L. J. Q. B. 534; *New Zealand Land Co. v. Watson* (1881) 7 Q. B. Div. 374; 50 L. J. Q. B. 433.

³⁰ *Armstrong v. Stokes* (1872) L. R. 7 Q. B. 598, 605; *Acc. Elbinger Actien-Gesellschaft v. Clape* (1873) L. R. 8 Q. B. 313; 41 L. J. Q. B. 253, affirmed on another point, L. R. 9 Q. B. 473; 43 L. J. Q. B. 211, showing that the foreign principal cannot sue on the contract; *Hutton v. Bulloch* (1873) L. R. 8 Q. B. 331, affirmed in Ex. Ch. L. R. 9 Q. B. 572, that he cannot be sued; *New Zealand Land Co. v. Watson* (1881) 7 Q. B. Div. 374; 50 L. J. Q. B. 433. Accordingly the customary rule does not apply where the foreign principal is liable by the express terms of the contract: *Miller, Gibb & Co. v. Smith & Tyrer* [1917] 2 K. B. 141; 86 L. J. K. B. 1259, C. A. In *Alaspons y Hermans v. Mildred* (1883) 9 Q. B. Div. 530; 53 L. J. Q. B. 33, the Court of Appeal refused to extend it to a case where the commission agent as well as the principal was foreign; the decision was affirmed in H. L., 8 App. Ca. 474, but this point not discussed.

³¹ *Lord Southampton v. Brown* (1827) 6 B. & C. 718; 30 R. R. 511; *Beckham v. Drake* (1841) 9 M. & W. at 95, affirmed sub nom. *Drake v. Beckham*, 11 ib. 315; 12 L. J. Ex. 486; 60 R. R. 691.

Harmer v. Armstrong [1934] 1 Ch. 65; 103 L. J. Ch. 1, C. A.

⁴¹ *Pickering's claim* (1871) L. R. 6 Ch. 325.

appear, in any other name. It is the same as if the principal had signed a wrong name with his own hand."

Again, an agent who would otherwise be liable on the contract made by him may exempt himself from liability by contracting in such a form as makes it appear on the face of the contract that he is contracting as agent only and not for himself as principal; a signature expressly 'as agent,' or to the like effect, will suffice although no such qualification appears in the body of the document⁴² and even though the principal's name is not disclosed. Conversely an unqualified signature will generally make the signer personally liable notwithstanding description of him as agent in the body of the document, short of clear operative words such as 'on account of' which will exempt him even if not annexed to the signature.⁴³

The signature is part of the contract, not an external rule, and the whole must be read together; still the signature carries most weight.⁴⁴ Special variations are possible: an agent even of a known principal may be treated as a contracting party and personally bound as well as his principal by the custom of a port or the particular trade in which he is dealing.⁴⁵ Or he may limit his liability by special stipulations, e.g., when a charter party is executed by an agent for an unnamed freighter and the agent's signature is unqualified but the charter party contains a clause providing that the agent's responsibility shall cease as soon as the cargo is shipped.⁴⁶

It is also a rule that an agent for a government is not personally a party to a contract made by him on behalf of that government by reason merely of having made the contract in his own name.⁴⁷ In some cases the agent, though *prima facie* not a party to the contract as agent, can yet sue or be sued as principal on a contract which he

⁴² *Lindus v. Brasted* 1848 7 C. B. 31, 17 L. J. C. P. 123. — R. R. 708. Cp. *Edmund v. Bushell* 1865 1 R. 1 Q. B. 47, 35 L. J. Q. B. 2.

⁴³ *Universal Steam Navigation Co. v. James McKel & Co.* [1902] A. C. 492, 92 L. J. K. B. 61. *Gadd v. Houghton* 1876 1 Ex. Div. 357, 46 L. J. Ex. 71 is approved. *Lennard v. Robinson* 1855 5 F. & B. 12, 24 L. J. Q. B. 17 is overruled. Earlier decisions are of authority only so far as consistent with *Gadd v. Houghton*. — see [1924] A. C. at 495.

⁴⁴ *Gadd v. Houghton* above.

⁴⁵ Compare *Lord Caves* and Lord Sumner's opinions in the *Universal Steam Navigation Co.* case note 43 above.

⁴⁶ *Humphrey v. Dale* 1857 7 E. & B. 260, 27 B. & F. 1001, 26 L. J. Q. B. 137. *Fleet v. Marlon* 1821 1 R. 7 Q. B. 126, 129, 41 L. J. Q. B. 49. *Hutchinson v. Latham* 1873 L. R. 8 C. P. 482, 42 L. J. C. P. 260. *Pike v. Ingley* 1887 18 Q. B. Div. 708, 56 L. J. Q. B. 373. On the general question of the construction of contracts made by brokers for their principals, see *Southwell v. Bowditch* (1876) 1 C. P. Div. 374, 45 L. J. C. P. 374, 630. As to indorsements of negotiable instruments, see *Elliot v. Bax-Ironside* [1917] 2 K. B. 301, 94 L. J. K. B. 807, C. A.

⁴⁷ *Ogleby v. Tylesias* 1854 E. B. & F. 930, 27 L. J. Q. B. 356. *Carr v. Jackson* 1852 7 Ex. 382, 21 L. J. Ex. 137, 86 R. R. 699.

⁴⁸ *Macbeth v. Haldimand* 1786 1 T. R. 172, cp. 16 b 674, 1 R. R. 177. *Gidley v. Lord Palmerston* 1822 3 Brod. & B. 275, 24 R. R. 668. A Minister of the Crown does not lose his immunity if his department is incorporated by statute for limited purposes, *Galleghan v. Minister of Health* [1932] 1 Ch. 86, 101 L. J. Ch. 81. The practical point is that in such case a petition of right is still the only form of remedy.

has made as agent. These will be mentioned under another head of this subject."

Where an undertaking is given in general terms, no promise being named, to a person who obviously cannot be a principal in the matter, it may be inferred as a fact from the circumstances that some other person interested is the real unnamed principal, and that person may recover on the contract.⁴⁰

B. When a party contracts with an agent whom he does not know to be an agent, the undisclosed principal is generally bound by the contract and entitled to enforce it, as well as the agent with whom the contract is made in the first instance.⁴¹

It has been held that an undisclosed principal is as much liable as a known one for contracts made by the agent within the general apparent authority of agents in that business.⁴²

But the limitations of this rule are important. In the first place, it does not apply where an agent for an undisclosed principal contracts in such terms as import that he is the real and only principal. There the principal cannot afterwards sue on the contract.⁴³ Much less, of course, could he do so if the nature of the contract itself (for instance, partnership) were inconsistent with a principal unknown at the time taking the place of the apparent contracting party. Likewise, "if the principal represents the agent as principal, he is bound by that representation. So, if he stands by and allows a third person innocently to treat with the agent as principal, he cannot afterwards turn round, and sue him in his own name."⁴⁴

It was long undecided whether an agent for an undisclosed principal must have authority at the time, or a man might adopt as principal an act not purporting at the time to be done on behalf of any principal, and not then authorized by him. A majority of the Court of Appeal once held that such ratification was possible, but this was reversed by the House of Lords as contrary to such authority as there was (with one obscure exception) and to the general reluctance of the Common Law to give effect to alleged intentions which were not disclosed or recorded at the time when, if at all, they were material.⁴⁵

⁴⁰ Pp. 88-89.

⁴¹ *Weidner v. Hoggett* (1876) 1 C. P. D. 533.

⁴² The rule is not excluded by the contract being in writing (not under seal) and signed by the agent in his own name. *Beckham v. Drake* (1841) 9 M. & W. at 91; 60 R. R. 684. See p. 82.

⁴³ *Watteau v. Fenwick* [1893] 1 Q. B. 346; *sed qu.*, see Lindley, *Partnership* (10th ed. 1935), 174 n., and L. Q. R. ix, 111. [*Kinahan & Co., Ltd., v. Parry* [1911] 1 K. B. 439; 80 L. J. K. B. 276 (better report), seems to be distinguishable as being a decision simply on the interpretation of facts.]

⁴⁴ *Humble v. Hunter* (1848) 12 Q. B. 310; 17 L. J. Q. B. 350; 76 R. R. 291, *dist. Fred. Drughorn v. Rederaktuebolaget Transallantur* [1919] A. C. 203 (description of agent as "charterer" not enough).

⁴⁵ *Farrand v. Buschaffshem* (1858) 4 C. B. N. S. 710, 717; 27 L. J. P. C. 302.

⁴⁶ *Durant v. Roberts & Co.* [1900] 1 Q. B. 629; 69 L. J. Q. B. 382, *dis. A. L. Smith L. J.*, *revid. nom. Kneighley, Maxsted & Co. v. Durant* [1901] A. C. 240 70 L. J. K. B. 662.

Again, in the cases to which the rule does apply, the rights of both the undisclosed principal and the other contracting party are qualified as follows:

*The principal "must take the contract subject to all equities in the same way as if the agent were the sole principal."*¹⁰ Accordingly if the principal sues on the contract the other party may avail himself of any defence which would have been good against the agent:¹¹ thus a purchaser of goods through a factor may set off a claim against the factor in an action by the factor's principal for the price of the goods.¹² "Where a contract is made by an agent for an undisclosed principal, the principal may enforce performance of it, subject to this qualification, *that the person who deals with the agent shall be put in the same position as if he had been dealing with the real principal*, and consequently he is to have the same right of set-off which he would have had against the agent."¹³ And his claim to be allowed such set-off is not effectually met by the reply that when he dealt with the agent he had the means of knowing that he was only an agent. The existence of means of knowledge is not material except as evidence of actual knowledge.¹⁴ On the other hand this equity against an undisclosed principal depends (so the House of Lords has held) on the third person's actual belief that he was dealing with a principal in that particular transaction. Mere absence of knowledge or belief whether the agent is dealing as an agent or on his own account is not enough.¹⁵

It has been said that conversely the right of the other contracting party to hold the principal liable is subject to the qualification that the state of the account between the principal and the agent must not be altered to the prejudice of the principal. But this doctrine has been disapproved by the Court of Appeal as going too far. The principal is discharged as against the other party by payment to his own agent only if that party has by his conduct led the principal to believe that he has settled with the agent, or, perhaps, if the

¹⁰ Story on Agency, § 420; Parke B. to the same effect in *Beckham v. Drake* (1841) 9 M. & W. at 98; 60 R. R. 689. (See p. 82.)

¹¹ If the agent sues in his own name the other party cannot set off a debt due from the principal whom he has in the meantime discovered, there being no mutual debt within the statute of set-off: *Isberg v. Bouden* (1853) 8 Ex. 852; 22 L. J. Ex. 322. Under the Judicature Acts, however, he can make the principal a party to the action by counter-claim and have the whole matter disposed of.

¹² *George v. Claggett* (1797) 7 T. R. 359; 4 R. R. 462; *Sims v. Bond* (1833) 5 B. & Ad. 389, 393; 39 R. R. 511, 515. Per Cur., *Isberg v. Bouden*, 8 Ex. at 859. It does not matter whether the factor is or is not actually authorized by his principal to sell in his own name without disclosing the agency: *Ex parte Dixon* (1876) 4 Ch. Div. 133; 46 L. J. Bk. 20; nor what restrictions may, as between himself and the principal, be imposed on him as to the price he is to sell at: *Sutton v. Biller* (1883) 25 Ch. Div. 31.

¹³ Per Willes J. *Dresser v. Norwood* (1863) 14 C. B. N. S. 574, 588; 32 L. J. C. P. 201, 205. The reversal of this case in the Ex. Ch. 17 C. B. N. S. 466; 34 L. J. C. P. 48, does not affect this statement of the general law. The principle is not confined to the sale of goods, e.g., *Montagu v. Forwood* [1893] 2 Q. B. 350, C. A.

¹⁴ *Barrett v. Imperial Ottoman Bank* (1873) L. R. 9 C. P. 38; 43 L. J. C. P. 3.

¹⁵ *Cook v. Eschby* (1887) 12 App. Ca. 271; 56 L. J. Q. B. 505. It is useless to criticize the decision in England; but see L. Q. R. iii. 358. [American law is apparently to the same effect as *Cook's* case: Williston, Contracts, § 59.]

principal has in good faith paid the agent at a time when the other party still gave credit to the agent alone, and would naturally, from some peculiar character of the business or otherwise, be supposed by the principal to do so."

Again, the other party may choose to give credit to the agent exclusively after discovering the principal, and in that case he cannot afterwards hold the principal liable; and statements or conduct of the party which lead the principal to believe that the agent only will be held liable, and on the faith of which the principal acts, will have the same result." And though the party may elect to sue the principal, yet he must make such election within a reasonable time after discovering him." When it is said that he has a right of election, this means that he may sue either the principal or the agent, or may commence proceedings against both, but may only sue one of them to judgment: and a judgment obtained against one, though unsatisfied, is a bar to an action against the other. Such is the rule as to principal and agent in general, and there is no exception in the case of a shipowner and freighter."

The mere commencement of proceedings against the agent or his estate after the principal is discovered, although it may possibly be evidence of an election to charge the agent only, does not amount to an election in point of law."

2. We have now to point out the results which follow when a man professes to make a contract as agent, but is in truth not an agent, that is, has no responsible principal.

We may put out of consideration all cases in which the professed agent is on the face of the contract personally bound as well as his pretended principal: for his own contract cannot be the less valid because the contract he professed at the same time to make for another has no effect. But when the contract is not by its form or otherwise such as would of itself make the professed agent a party to it there are several distinctions to be observed.

First, let us take the cases where a principal is named. The other party *prima facie* enters into the contract on the faith of that principal's credit. But credit cannot be presumed to be given except to a party who is capable of being bound by the contract: hence it is material whether the alleged principal is one who might authorize or ratify the contract, but does not, or is one who could not possibly do so.

⁴¹ *Irvine v. Watson* (1880) 5 Q. B. Div. 414; 40 L. J. Q. B. 531, which seems on this point to reduce the authority of *Armstrong v. Stokes* (1872) L. R. 7 Q. B. 508; 41 L. J. Q. B. 313, to that of a decision on peculiar facts.

⁴² Story on Agency, §§ 270, 288, 291; *Horsfall v. Fauntleroy* (1890) 10 B. & C. 755; but the principal is not discharged unless he has actually dealt with the agent on the faith of the other party's conduct so as to change his position: *Wyatt v. Hartford* (1802) 3 East, 147.

⁴³ *Smethurst v. Mitchell* (1859) 1 E. & E. 622; 28 L. J. Q. B. 241; 117 R. R. 374.

⁴⁴ *Prestley v. Fernie* (1865) 3 H. & C. 977, 983; 34 L. J. Ex. 173; cp. L. R. 6 C.P. 499.

⁴⁵ *Curtis v. Williamson* (1874) L. R. 10 Q. B. 57; 44 L. J. Q. B. 27.

a. The more frequent case is where the party named as principal is one who might be responsible.

It is settled law that there, subject to the qualifications which will appear, the pretended agent has not either the rights or the liabilities of a principal on the contract.

First, as to his rights. In *Bickerton v. Burrell*⁶¹ the plaintiff had signed a memorandum of purchase at an auction as agent for a named principal. Afterwards he sued in his own name to recover the deposit then paid from the auctioneer, and offered evidence that he was really a principal in the transaction. But he was nonsuited at the trial, and this was upheld by the full Court. Lord Ellenborough C. J. said: "Where a man assigns to himself the character of agent to another whom he names, I am not aware that the law will permit him to shift his situation and to declare himself the principal, and the other to be a mere creature of straw. He held that a man who has dealt with another as agent" is not at liberty to retract that character *without notice* and to turn round and sue in the character of principal, and that in this case the plaintiff had misled the defendant and was bound to undeceive him before bringing an action. This leaves it doubtful what would have been the precise effect of the plaintiff giving notice of his real position before suing, but the modern cases seem to show that it would only have put the defendant to his election to treat the contract as a subsisting contract between himself and the plaintiff or to repudiate it at once."

The doctrine under consideration was further defined in *Rayner v. Grote*⁶². There the plaintiff sued to recover a balance due upon the sale by him to the defendants of a quantity of soda ash according to a bought note in this form: "I have this day bought for you the following goods from J & T Johnson: 50 tons soda ash.

J. H. Rayner. It was proved that the plaintiff was the real owner of the goods, and 15 tons out of the 50 had been delivered to the defendants and accepted by them at a time when there was strong evidence to show that they knew the plaintiff to be the real principal. The law was stated as follows: "

In many cases [viz. where the contract is wholly unperformed] such as for instance the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then shew himself to be the real principal and sue in his own name, and perhaps it may be fairly urged that this, in all executory contracts, if

⁶¹ (1816) 5 M. & S. 383, 386.

⁶² *Id.* for a named and responsible principal.

⁶³ *Fellowes v. Lord Gwydyr* (1826-7) 1 Sum. 63, 1 Russ. & M. 83, 32 R. R. 148, in which *Bickerton v. Burrell* was not cited, can be supported, if at all, only on the ground that the facts brought the case within the principle of *Rayner v. Grote* (see next paragraph). The judgments cannot be regarded as good law, nor can any reason be found for a difference between common law and equity on the point.

⁷⁰ (1846) 15 M. & W. 359, 16 L. J. Ex. 79, 71 R. R. 709.

⁷¹ *Per Cur.* 15 M. & W. at 365, and see the remarks on *Bickerton v. Burrell*, *ad fin.*

wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule."

But here part performance had been accepted by the defendants with full knowledge that the plaintiff was the real principal, and it was therefore considered that the plaintiff was entitled to recover.

Next, as to the pretended agent's liability. It was at one time thought that an agent for a named principal who turned out to have no authority might be sued as a principal on the contract."

But it has been determined that he is not liable on the contract itself." He is liable, however, on an implied warranty of his authority to bind his principal. This was decided in *Collen v. Wright*,¹⁴ and is now finally established by the authority of the House of Lords.¹⁵ In the rare case of a person purporting to contract as agent for a named principal, and at the same time expressly disclaiming any present authority, the implied warranty is excluded, for the other party does not rely on the existence of authority and is not misled, but is content to take the chance of ratification for what it may be worth.¹⁶ The pretended agent is also generally liable to an action in tort if he did not believe that he had authority.¹⁷ The liability on implied warranty is not affected by the supposed agent's good faith where he does so believe, and it is now decided that the rule applies even where a real authority has been determined, unknown to the agent, by the death or lunacy of the principal.¹⁸

¹² Cp. Pothier, Obl. § 75.

¹³ *Lewis v. Nicholson* 1852 18 Q. B. 303, 21 L. J. Q. B. 311.

¹⁴ 1857 7 L. & B. 601, 26 L. J. Q. B. 147; 30 Ex. Ch. 8 E. & B. 647, 27 L. J. Q. B. 215, 110 R. R. 602.

¹⁵ *Richardson v. Williamson* 1871 L. R. 6 Q. B. 276, 40 L. J. Q. B. 145, *Cherry v. Colonial Bank of Australasia* 1890 L. R. 3 P. C. 24, 31, *Starkley v. Bank of England* [1903] A. C. 114, 72 L. J. Ch. 402. But the representation of the agent that he has authority must be a representation of matter of fact and not of law. *Beattie v. Lord Lebury* 1872 L. R. 7 Ch. 777, 7 H. L. 102, 31 L. J. Ch. 804, 44 L. 20, *Weeks v. Property* 1873 L. R. 8 C. P. 42, 43, 42 L. J. C. P. 129. And the rule cannot be applied to make a public servant acting on behalf of the Crown personally liable, *Dunn v. MacDonald* [1897] 1 Q. B. 555, 66 L. J. Q. B. 420, C. A. As to the measure of damages, *Simon v. Pakker* 1857 L. & B. 508, 26 L. J. Q. B. 195, 110 R. R. 730, *Spedding v. Acland* 1900 L. R. 4 C. P. 212, 38 L. J. C. P. 133, *Godwin v. Francis* 1870 L. R. 5 C. P. 295, 39 L. J. C. P. 121, *Ex parte Panmure* 1881 24 Ch. D. 176. The rule in *Collen v. Wright* is not confined to cases where the assumed authority is to enter into a contract. *Starkley v. Bank of England*, in C. A. note *Utter v. Bank of England* [1902] 1 Ch. at 622. See, further, *Salvesen & Co. v. Rederi Aktieselskabet Nordstjernen* [1905] A. C. 302; 74 L. J. P. C. 96, where an attempt to extend the rule to an agent's report to his own principal failed, an erroneous report as to the other party's intentions may be a breach of duty, but it is not a warranty. [The scientific basis of the doctrine of implied warranty has been disputed; the variant views are discussed in Winfield, *Province of Tort*, 177-178.]

¹⁶ *Halbot v. Lens* [1901] 1 Ch. 344, 70 L. J. Ch. 125. It would seem arguable that in such a case there is nothing capable of ratification.

¹⁷ *Randell v. Trumen* (1856) 18 C. B. 786, 25 L. J. C. P. 307; 107 R. R. 516. The main object of establishing the liability *ex contractu* was to have a remedy against executors.

For a somewhat similar doctrine applied to the contract to marry, see *Millicard v. Littlewood* (1850) 5 Ex. 775, 20 L. J. Ex. 2, 82 R. R. 871, and *Wild v. Harris* (1849) 7 C. B. 990, 18 L. J. C. P. 297; 78 R. R. 899. Here, however, there is not properly a warranty, for the promisor's undertaking that he is legally capable of marrying the promisee is a term in the principal contract itself. See Chap. VII. *ad fin.*

¹⁸ *Tonge v. Toynbee* [1910] 1 K. B. 215; 79 L. J. K. B. 208, C. A. This overrules *Simons v. Ilbery* (1843) 10 M. & W. 1; 62 R. R. 510, at any rate as a general authority and other cases which followed it, such as *Salton v. New Beeston Cycle Co.* [1900] 1 Ch. 43; 69 L. J. Ch. 20.

b. The rules last stated are applicable only where the alleged principal was ascertained and existing at the time the contract was made, and might have been in fact principal.

Here the doctrine of ratification is important. When a principal is named or described, but is not capable of authorizing the contract so as to be bound by it at the time, there can be no binding ratification: for "ratification must be by an existing person on whose behalf a contract might have been made at the time."¹⁰

There fall under this head contracts entered into by professed agents on behalf of wholly fictitious persons, or uncertain persons or sets of persons with whom no contract can be made by the description given, persons in existence but incapable of contracting, and lastly (which is in practice the most important case) proposed companies which have not yet acquired a legal existence.¹¹ Now when a principal is named who might have authorized the contract, there is at the time of the contract a possibility of his being bound by subsequent ratification. But when the alleged principal could not have authorized the contract, then it is plain from the beginning that the contract can have no operation at all unless it binds the professed agent. It is construed accordingly *ut res magis valeat quam pereat*, and he is held to have contracted in person.¹² This principle has been carried so far that in a case where certain persons, churchwardens and overseers of a parish, covenanted "for themselves and for their successors churchwardens and overseers of the parish," and there was an express proviso that the covenant should not bind the covenantors personally, but was intended to bind the churchwardens and overseers of the parish for the time being as such churchwardens, &c. but not otherwise, it was held that since the funds of the parish could not be bound by the instrument in the manner intended, the effect of the proviso was to make no one liable on the covenant at all, and therefore the proviso was repugnant and void, and the covenantors were personally liable.¹³

¹⁰ Per Willes J. and Byles J. *Kelner v. Baxter* (1866) 1 L. R. 2 C. P. 174, 185, 30 L. J. C. P. 94; *Scott v. Lord Ebury* (1867) 1 L. R. 2 C. P. 255, 267, 36 L. J. C. P. 161. When ratification is admitted, the original contract is imputed by a fiction of law to the person ratifying, and the fiction is not allowed to be extended beyond the bounds of possibility.

¹¹ *Kelner v. Baxter* (1866) 1 L. R. 2 C. P. 174, and authorities there referred to; *Scott v. Lord Ebury* (1867) ib. 255; *Empress Engineering Co.* (1880) 16 Ch. Div. 125, overruling *Spiller v. Paris Skating Rink Co.* (1878) 7 Ch. D. 368. Companies have been held in equity to be bound by the agreements of their promoters, but on grounds independent of contract. Action upon such an agreement by the company, under the mistaken belief that it is binding, cannot be treated as evidence of a new agreement; *Re Northumberland Avenue Hotel Co.* (1886) 33 Ch. Div. 16, 54 L. J. 777.

¹² *Kelner v. Baxter* (1866) 1 L. R. 2 C. P. at 183, 185.

¹³ *Furness v. Loomes* (1843) 5 M. & Gr. 736; 12 L. J. C. P. 265; 63 R. R. 455; followed in a similar case of covenant "as trustees," *Walling v. Lewis* (1911) 1 Ch. 414, 80 L. J. Ch. 242. But the doctrine will certainly never be extended (see *Williams v. Hathaway* (1877) 6 Ch. D. 544); and *quæ* whether it would apply to an instrument not under seal. It is clearly competent to the parties to such an

Accordingly the proper course for the other contracting party is to sue the agent as principal on the contract itself, and he need not resort to the doctrine of implied warranty.⁴⁶ And as the agent can be sued, so it is apprehended that, in the absence of fraud, he might sue on the contract in his own name.

A slightly different case is where a man professes to contract as agent, but without naming his principal. He is then (as said above) *prima facie* personally liable in his character of agent. But even if the contract is so framed as to exclude that liability (and therefore any correlative right to sue), he is not precluded from showing that he himself is the principal and suing in that character. This was decided in *Schmaltz v. Avery*.⁴⁷ The action was on a charter party. The charter-party in terms stated that it was made by Schmaltz & Co. (the name under which the plaintiff traded) as agents for the freighters. It then stated the terms of the contract and concluded in these words: "This charter being concluded on behalf of another party it is agreed that all responsibility on the part of G. Schmaltz & Co. shall cease as soon as the cargo is shipped." This clause was not referred to in the declaration; nor was the character of the plaintiff as agent mentioned, but he was treated as principal in the contract. At the trial it was proved that the plaintiff was in joint of fact the freighter. Before the Court in banc *Bickerton v. Burrell* and *Rayner v. Grote*⁴⁸ were cited on for the defence, but it was pointed out that in those cases the agent named a principal on the faith of whose personal credit the other party might have meant to contract. Here the names of the supposed freighters not being inserted, no inducement to enter into the contract from the supposed solvency of the freighters [could] be surmised. The plaintiff might contract as agent for the freighter, whoever that freighter might turn out to be, and might still adopt that character of freighter himself if he chose. And conversely, a man who has contracted in this form may nevertheless be sued on the contract as his own undisclosed principal, if the other party can show that he is in truth the principal, but not otherwise. In the same manner it is open to one of several persons with whom a contract was

instrument to make its operation as a contract conditional on any event they please, and in such a case as this why may they not agree that nobody shall be bound if the principal cannot be? In *Kelner v. Baxter* oral evidence was offered that such was the intention, but was rejected as contrary to the terms of the writing sued upon.

⁴⁶ *Kelner v. Baxter*, note 41. Cp. *West London Commercial Bank v. Kistson* (1884) 12 Q. B. D. 157, where a bill was accepted by directors on behalf of a company which had no power to accept bills, the liability was put on the ground of deceit in 13 Q. B. Div. 360, 53 L. J. Q. B. 345. [For American law, see Williston, *Contracts*, §§ 278, 282, 303.]

⁴⁷ (1851) 16 Q. B. 655 (the statement of the facts is taken from the judgment of the Court, p. 658), 20 L. J. Q. B. 228, 33 R. R. 653.

⁴⁸ See pp. 80-87.

⁴⁹ 16 Q. B. at 662, 663. In a later case in the Exchequer Chamber (*Charman v. Brand* (1871) L. R. 6 Q. B. 720, 40 L. J. Q. B. 312) there are some expressions not very consistent with this, but they were by no means necessary for the decision. Moreover *Schmaltz v. Avery* was not cited.

⁵⁰ *Carr v. Jackson* (1852) 7 Ex. 382, 21 L. J. Ex. 137; 86 R. R. 609.

nominally made to show that he alone was the real principal, and to sue alone upon the contract accordingly."

2.—Artificial Persons

NATURE OF CORPORATE BODIES

In a complex state of civilization, such as that of the Roman Empire, or still more of the modern Western nations, it constantly happens that legal transactions have to be undertaken, rights acquired and exercised and duties incurred by or on behalf of persons who are for the time being charged with offices of a public nature involving the tenure and administration of property for public purposes or interested in carrying out a common enterprise or object. This enterprise or object may or may not be of a kind likely to be worked out within a definite time and may or may not further involve purposes and interests of a public nature. The rights and duties thus created as against the world at large are wholly distinct from the rights and duties of the particular persons immediately concerned in the transactions. Those persons deal with interests beyond their own though in many cases including or involving them, and it is not to their personal responsibility that third parties dealing with them are accustomed to look.

This distinction (the substantial character of which it is important to bear in mind) is conveniently expressed in form by the Roman invention adopted and largely developed in modern systems of law of treating the collective persons who from time to time hold such a position "or in some cases and according to some opinions the property or office itself as a single and continuous artificial person" or ideal subject of legal capacities and duties. It is possible to regard the artificial person as a kind of fictitious substance conceived as supporting legal attributes and in fact this was, until lately, the prevailing theory of modern civilians on the Continent.¹⁰⁰ But it is equally possible and it seems not only more philosophical but more business-like to hold that what we call the artificial identity of a corporation is within its own sphere and for its own purposes just as real as any other identity.¹⁰¹ The corpora-

¹⁰⁰ *Sparrow v. Cass* 1870 1 R. Q. B. 676, 30 L. J. Q. B. 249.

¹⁰¹ *Et corpus or esse moral persone morale* but this does not necessarily import capacity to sue or be sued in a corporate name. Germ. *juristische Person*, Ital. *ente morale*. Kent Comm. 2, 268, uses the term 'moral person' but it has not been generally adopted by English writers (nor does it appear to have gained currency in American law see Morawetz, Corporations § 1). Observe that the English term 'artificial' is not the same as 'fictitious'.

¹⁰² See F. W. Maitland's Introduction to Gierke's *Political Theories of the Middle Ages* (Cambridge 1900), further references there, at p. xxvi, and the late Prof. R. Saleilles "De la personnalité juridique" Paris, 1910. [A recent valuable bibliography of the topic is given in Dr. Hallis' study on *Corporate Personality* 1930, 247-250. The learned author examines the various Continental theories.]

¹⁰³ "A corporation is a legal person just as much as an individual" per Cave J. *Re Sheffield, &c. Building Socy* (1889) 22 Q. B. D. at 476. In the United States a corporation duly created by the laws of any State is treated as a person dwelling in, and therefore a citizen of, that State within the meaning of the constitutional provision which enables the Federal courts to entertain suits between citizens of

tion becomes, within the limits assigned to its existence, "a body distinct from the members composing it, and having rights and obligations distinct from those of its members." This is often called a fiction: but it represents a class of facts not confined to legal use or legal purposes. In the case of an ordinary partnership the firm is treated by mercantile usage as an artificial person, though not recognized as such by English law; and other voluntary and unincorporated associations are constantly treated as artificial persons in the language and transactions of everyday life. An even more remarkable instance is furnished by the artificial personality which is ascribed to the public journals by literary custom or etiquette, and is so familiar in writing and conversation that its curiosity most commonly escapes attention. The existence of these artificial persons by private convention, if we may so call them, shows that, if indeed there be any fiction in the matter, it is not superfluous or arbitrary."

In the Common Law no speculative opinion on the subject has been definitely adopted," though it seems likely that only Coke's incapacity for grasping any general theory, good or bad, saved us from what is now known as the "fiction theory" among Continental publicists."

In our authorities and practice the necessary marks of legal corporate existence are a recognized collective name (which however need not be expressly conferred at the outset), and capacity to sue, be sued, and do other acts in the law, in that name."

Perpetual succession, that is, the existence of a body independent of the natural life of any one or more members, and a common seal to authenticate the corporate acts, are consequences or incidents of incorporation rather than primary constituents. A corporation

different States. See *Marshall v. Baltimore and Ohio Rail. Co.* (1853) 16 Howard, 314. But it is not a citizen for all purposes, nor entitled to all the constitutional immunities of individuals: *Blake v. McClear* (1898) 172 U. S. 239; *Orient Ins. Co. v. Dagg* (1890) 105 557; *Berea College v. Kentucky* (1908) 211 U. S. 45. In Germany the State, as an owner of property, is specially personified as "the Fisc," after Roman precedent, and has not only the rights but the liabilities of any private owner, see L. Q. R. xxiii, 13.

"The orthodox doctrine of the Common Law, which recognizes only individuals and corporations as entities, undoubtedly lags far behind the ordinary conceptions of laymen." Harv. Law Rev. xv, 311. The ingenious Dr. Baty, *more ruse*, admits the reality, but denies it a personal or legal character: Harv. Law. Rev. xxxiii, 359.

Hobbes gives an admirable exposition of the purely individualist view in the 16th chapter of his *Leviathan*, but of course without regard to authority. As to the authorities, see discussion by the present writer in *Essays in the Law*, 1923, p. 151, also in L. Q. R. xxvii, 219.

The slight reference to Roman law in the *Sutton's Hospital* case, 10 Co. Rep. at fo. 29b, suggests that, if any theory had been formulated, it would have been the then received one of the civilians. The case itself is incompatible with one logical consequence of the fiction theory, that a corporation has only such powers as are expressly conferred upon it.

It seems, however, that a statutory body may have all this conferred on it without being a corporation if there does not appear a manifest intent to incorporate. See the judgment of Atkin L.J. in *Mackenzie-Kennedy v. Air Council* [1927] 2 K. B. 517, 534; 96 L. J. K. B. 1145, where the action was held not maintainable for other reasons. Having regard to the frequency of inartificial drafting in recent statutes, this appears, with all respect, to be a dangerous piece of subtlety.

legally qualified to act as such can exist only with the sanction of the State, which may be expressed in England by a royal charter⁹⁰ or by statute. The statutory sanction may take the form—as in the familiar case of the Companies Acts—of authorizing persons who are so minded to constitute themselves into corporations by fulfilling specified general conditions. In this class of cases, at any rate, it would seem that the operative registration or other appointed formality, is not properly considered as involving fiction of any kind, but is the official recognition and regulation of substantial matters of fact. With us the official sanction is a matter of procedure and public convenience. In the Roman law of the Empire it was an offence to form any kind of association without public authority, thus the early Christian churches were exposed to penalties by the mere fact of being *collegia illicita*.⁹¹ This principle has largely survived in the modern public law of the Continent; only the faintest signs of any attempt to imitate it occur in ours.⁹²

The holders of ecclesiastical benefices and dignities are said, by an analogy which is of no great antiquity, to be "corporations sole". Little or no useful result seems to be attained, for the alleged corporate character of a parson does not prevent the free hold of the church from being in abeyance when he dies, though a grant to an existing parson and his successors is effectual. By a still more doubtful extension of the analogy, the Crown is said to be a corporation sole,⁹³ and the same description has been applied by statute to the holders of a certain number of public offices,⁹⁴ sometimes for specially limited purposes with resulting complications or anomalies.⁹⁵ One is tempted to say of corporations sole, as medieval schoolmen said of the angels, that they do not form a species but every one is a species by itself. It may be sufficient to observe, so far as the principle is concerned, that for many centuries the Vatican and its contents—to say nothing of the spiritual powers and other temporal possessions of the Holy See—have been held under an absolutely unique system of succession, but it has never occurred to any one to call the Pope a corporation sole. At any rate, the persons whom we have to call corporations sole in England can do very little in their corporate capacity, and in particular

⁹⁰ The want of this has to be supplied in some cases by the fiction of a *lost grant*. Blackst Comm. i. 473. See the whole chapter, Book 1, ch. 10, for a literary exposition of the Common Law doctrine as it stood in the latter part of the 18th century. He likens the continuous existence of a corporation to that of the river Thames.

⁹¹ [The whole topic has recently been considered in Mr. P. W. Duff's *Personality in Roman Private Law* (1938). See especially ch. iv. and pp. 174-187.]

⁹² It is said to be an offence to "assume to act as a corporation" but this is far short of the Roman prohibition.

⁹³ The theory of the King's "body politic" is given at some length in Plowd. 213. It would seem to have been a fashionable novelty at the time.

⁹⁴ See F. W. Maitland, *The Corporation Sole*, J. Q. R. xvi, 335. The Crown as Corporation, *ib.* xvii, 131. The notion of a corporation sole appears to date only from the 16th century. As to the Postmaster-General, see per Mathew L.J. *Bambridge v. Postmaster-General* [1906] 1 K. B. at 193.

⁹⁵ See pp. 82-83.

cannot bind or even benefit their official successors by contract, except in one or two peculiar cases;³ [but the benefit of such a contract will pass to the corporator's personal representative⁴ unless there is a special custom to the contrary.⁵ The Law of Property Act, 1925, provides that a contract made with a corporation sole while the office is vacant shall, on the filling of the vacancy, be deemed to take effect as if the vacancy had been filled before the contract was made and the successor may accept or disclaim the contract⁶]. Some extreme theorists have refused to see more in any corporation than a device of procedure: in the case of a corporation sole there is really nothing else to see. We therefore have nothing to learn in that quarter for the purposes of this work, and we may practically confine our attention to corporations aggregate.

We have to ascertain what contracts corporate bodies can make, and how they are to be made. The second of these questions is reserved for the following chapter on the Form of Contracts. The first cannot be adequately treated except in connection with a wider view of the capacities, powers, and liabilities of corporations in general.

LIMITS OF CORPORATE CAPACITY

The capacities of corporations are limited

- (i) By natural possibility, *i.e.* by the fact that they are artificial and not natural persons.
- (ii) By legal possibility, *i.e.* by the restrictions which the power creating a corporation may impose on the legal existence and action of its creature.

First, of the limits set to the powers and liabilities of corporations by the mere fact that they are not natural persons.

The requirement of a common seal (of which elsewhere) is sometimes said to spring from the artificial nature of a corporation. The fact that it is not known in Scotland is, however, enough to show that it is a mere positive rule of English law. The correct and comprehensive proposition is that a corporation can do no executive act except by an agent; and a corporate seal is only one way of showing that the person entrusted with it is an authorised

³ Generally "bishops, deans, parsons, vicars, and the like cannot take obligation to them and their successors, but it will go to the executors." *Arnold's case*, Hob. 64; 20 E. IV. 2, pl. 7. *Howley v. Knight* (1849) 14 Q. B. 240; 19 L. J. Q. B. 3. 80 R. R. 262. "Regularly no chattel can go in succession in a case of a sole corporation." Co. Litt. 46 b, "it was otherwise in the case of the head of a religious house, as he could not make a will." Ro. Abr. 1. 515. See the old authorities summed up in Blackst. Comm. II, 431-433, who attempts to find reasons. A curious modern case where a fund of stock was vested in certain rectors and their successors by a private Act is *Powis v. Banks* [1901] 2 Ch. 487; 70 L. J. Ch. 700. In truth, as Prof. J. C. Gray said (*The Nature and Sources of the Law*, 1909, § 135), a corporation sole "is simply a series of natural persons, some of whose rights are different and devolve in a different way from those of natural persons in general."

⁴ *Howley v. Knight* (1849) 14 Q. B. 240.]

⁵ *Byrd v. Wilford* (1593) Cro. Eliz. 464.]

⁶ [15 & 16 Geo. 5, c. 20, s. 180 (3).]

agent of the corporate body.' We say that executive acts of a corporation must be done by an agent. It does not seem necessary or plausible to extend the proposition to deliberate acts and resolutions. When, for example, the assembled Fellows of a College resolve to grant a lease of certain college land, their resolution, whether unanimous or by the statutable majority, would seem to be the act not of agents but of the college itself. For if the Fellows voting are agents, who authorized them, and when? But when they proceed to order the affixing of the College seal to the lease, then the officer of the College who is directed to affix it is an appointed agent, whether he is himself a member of the governing body or not. There seem also to be cases in which the permanent authority of the head or other acting member of a corporation is derived not from any authority specifically conferred on him, but from the original constitution of the corporation. Here however, the conception of an implied agency is convenient and fairly applicable. Indeed, the Common Law doctrine of agency is so wide and flexible that we practically tend to regard all acts whatever done in the name of a corporation as derived from some authority, general or special, vested in the natural persons by whom they are done. This may not be a strictly correct view, but it has largely saved us from the speculative questions which have vexed Continental jurists ever since the thirteenth century, and probably also from much more serious errors.

A corporation obviously cannot be subjected to death, corporal punishment, or imprisonment, though it can be fined* or made to pay damages as easily as a natural person. Accordingly a limited company cannot be committed for trial on an indictment.⁷ Further, it is understood that a corporation is incapable of committing the graver kinds of crime, such as treason, felony, perjury, or offences against the person,⁸ as well as of being punished for them.

⁷ [It is by no means certain whether the requirements of a seal is a formal or a material restriction. The courts have never decided which is the correct view, and there is a conflict of opinion upon this not only in separate cases but even in the self-same judgments. The cases are noted in Salmon & Winfield, *Contracts*, 484-486, where the practical consequences of the difference between the two views are pointed out, and it is added that the difficulties of the situation are lessened by the liberal exceptions to the rule that a seal is necessary.]

⁸ *E.g.*, for contempt: *R. v. J. G. Hammond & Co* [1914] 2 K. B. 806, 811 L. J. K. B. 1221, objections as to form of rule not overruled. [Though manslaughter is finable a corporation cannot be indicted for it: *R. v. Cory Bros* [1927] 1 K. B. 810, 96 L. J. K. B. 761.] As to the enforcement of a writ of mandamus addressed to a corporate body, *R. v. Poplar Borough Council* No. 20 [1922] 1 K. B. 95; 91 L. J. K. B. 174, C. A.

⁹ *R. v. Daily Mirror Newspapers* [1922] 2 K. B. 530, 91 L. J. K. B. 712, C. C. A. The Criminal Justice Act, 1925, does not increase the substantive liability of corporations. *R. v. Cory Bros & Co* [1927] 1 K. B. 810, 96 L. J. K. B. 761.

¹⁰ *Reg. v. G. N. of Eng. Ry. Co* (1846) 9 Q. B. 315, 326; 16 L. J. M. C. 16; 72 R. R. 262; not, it is said, can it be excommunicated, for it has no soul: 10 Co. Rep. 32 b; the ultimate authority for this was a decree of Innocent IV. at the Council of Lyons in 1245, but otherwise as to interdict. Gierke, *Deutsche Genossenschaftsrecht*, iii, 348-9. So a corporation cannot do homage: Co. Litt. 66 b. Nor can it be subject to the jurisdiction of a customary court whose process is exclusively personal: *London Joint Stock Bank v. Mayor of London* (1875) 1 C. P. D. 1; 45 L. J. C. P. 213, in C. A. chiefly on other grounds, 5 C. P. Div. 494; affirmed on

There can be no real authority to commit such acts. Any or all of the members or officers of a corporation who should commit acts of this kind (e.g., should levy war against the King) under cover of the corporate name and authority would be individually liable to the ordinary consequences. Offences, certainly offences of commission, are the offences of individuals, not of corporations.¹¹ Nor can a corporation undertake duties which, though it might be strictly possible for a corporation to perform them by its officers or agents, are on the whole of a personal kind.¹² On the other hand, it is subject to the same liabilities as any other employer for the acts, neglects and defaults of its agents done in the course of their employment¹³ and conversely it may sue in its corporate capacity for a libel [or slander] reflecting on the management of its business.¹⁴ And the same principle is extended to make it generally subject to all liabilities incidental to its corporate existence and acts though the remedy may be in form *ex delicto* or even criminal. Although it cannot commit a real crime, it may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large,¹⁵ and may be indicted for a nuisance produced by the execution of its works or conduct of its business in an improper or unauthorized manner as for obstructing a high way or navigable river.¹⁶ A corporation may even be liable by prescription or by having accepted such an obligation in its charter to repair highways etc. and may be indictable for not doing it.¹⁷ A corporation carrying on business may likewise become liable to penalties imposed by any statute regulating that business, unless a contrary intention appears from the language of the Act or the nature of the case. A steamship company was held (on

this point in the House of Lords, 6 App. Cas. 393. Nor can it by a person wilfully pretending to be a solicitor. *Law Society v. United Service Bureau* [1934] 1 K. B. 343, 103 L. J. K. B. 81. We are not aware that any English writer has thought it necessary to state in terms that a corporation cannot be married or have any next of kin. The statement is to be found in Savigny *Syst.* 3 239, but is in part not quite so odd as it looks as in Roman law *patria potestas* and all the family relations arising therefrom might be acquired by adoption.

¹¹ *Bramwell* 1 J. 5 Q. B. D. at 313. Cf. *Minor of Manchester v. Williams* [1891] 1 Q. B. 91, 60 L. J. Q. B. 23.

¹² *Ex parte Swansea Friendly Society* 1879 11 Ch. D. 768, 48 L. J. Ch. 577.

¹³ Difficulties, formal and material which used to be entertained on this head are now removed. Even malicious prosecution is not now thought to be an exception. See *Cornford v. Carlton Bank* [1900] 1 Q. B. 22, 68 L. J. Q. B. 1020 C. A. In the Middle Ages the possibility of a corporation committing a delict was disputed by the canonists but generally maintained by the civilians. Gierke, *op. cit.* 402.

¹⁴ *South Heaton Coal Co. v. F. News Issue* [1894] 1 Q. B. 139, 63 L. J. Q. B. 293 C. A. [*D. & L. Caterers, Ltd. v. D. You* [1945] K. B. 354].

¹⁵ *Ryg v. G. N. of Eng. Ry. Co.* 1846 9 Q. B. 315, per Cur. at 326, 16 L. J. M. C. 16, 72 R. R. 262, 269.

¹⁶ See Grant on Corporations, 277, 284, Angell and Ames on Corporations, §§ 904-7. *Wms. Saund.* 1 614, 2 473.

¹⁷ *Pharmaceutical Society v. London and Provincial Supply Association* 1880 5 App. Cas. 857, see per Lord Blackburn at 869, Interpretation Act, 1889, s. 2, sub-s. (1). *Pearks v. Ward* [1902] 2 K. B. 1, 71 L. J. K. B. 656, as to summary jurisdiction, *Evans & Co. v. L. C. C.* [1914] 3 K. B. 315, 83 L. J. K. B. 1264. As to remedy by injunction, *A. G. v. Churchill's Vet. Sanatorium* [1910] 2 Ch. 401. But this does not extend to making a corporation punishable as a rogue and vagabond. *Hank v. E. Hulston & Co.* [1909] 2 K. B. 93, 78 L. J. K. B. 693. A corporation cannot sue as a common informer without special statutory authority. *Guardians of St. Leonard's, Shoreditch v. Franklin* [1878] 3 C. P. D. 377.

the terms of the particular statute, as it seems) to be not indictable under the Foreign Enlistment Act, 1819 (59 Geo. 3. c. 69), and therefore not entitled to refuse discovery which in the case of a natural person would have exposed him to penalties under the Act." As to the difficulty of imputing fraudulent intention to a corporation, which has been thought to be peculiarly great, it may be remarked that no one has ever doubted that a corporation may be relieved against fraud to the same extent as a natural person. There is exactly the same difficulty in supposing a corporation to be deceived as in supposing it to deceive, and it is equally necessary for the purpose of doing justice in both cases to impute to the corporation a certain mental condition—of intention to produce a belief in the one case or belief produced in the other—which in fact can exist only in the individual mind of the member or servant of the corporate body who acts in the transaction. Lord Langdale found no difficulty in speaking of two railway companies as guilty of fraud and collusion though not in an exact sense.¹¹ However, the members of a corporation cannot even by giving an express authority in the name of the corporation make it responsible, or escape from being individually responsible themselves for a wrongful act which though not a personal wrong is such that if lawful it could not have been a corporate act. Such is a trespass in removing an obstruction of an alleged highway. For the right by which the act has to be justified is the personal right to use the highway, and a corporation as such cannot use a highway. Likewise it is not competent to the governing body or the majority or even to the whole of the members for the time being of a corporation constituted by a formal act and having defined purposes, to appropriate any part of the corporate funds to their private use in a manner not distinctly warranted by the constitution, for it is not to be supposed that *all the members* of the corporation are equivalent to the corporation so that they can do as they please with corporate property. A corporation does not exist merely for the sake of the members for the time being. Lord Langdale held on this principle that the original members of a society incorporated by charter, who had bought up the shares of the society by agreement among themselves, were bound to account to the society for the full value of them.¹² The fallacy of the assumption that a corpora-

¹¹ *King of Two Shires v. Wilcox* (1851) 1 Sim N S 301, 335, 19 L J Ch 488, 80 R R 104.

¹² See per Lord Blackburn, 3 App Ca 1264. "A company may feel aggrieved." Companies Act, 1929, s. 295, sub-s. (6) re-enacting a provision of the former Acts.

¹² 12 Beav 382, 85 R R 120.

¹³ *Mull v. Hauser* 1874 1 L R 9 Ex 309, 318, 43 L J Ex 49, no judgment on this part of the case in Ex Ch 1 R 10 Ex 92. It might be, by statute, the right or duty of a corporation to remove obstructions, and the real question here was whether a highway board had such a power or duty. [It is controversial whether a corporation can be made liable for a tort which is *ultra vires* and which it has expressly authorized. Winfield, Text-Book of Tort, §26.]

¹⁴ *Society of Practical Knowledge v. Abbott* (1840) 2 Beav 559, 567, 30 R R 288, 294. Cp. Sav Syst 3 283, 335. But it may be otherwise if the corporation has no definite constitution and no rules prescribing the application of its property. Such cases are sometimes met with. *Brown v. Dale* (1878) 9 Ch D 78.

tion has no rights as against its unanimous members is easily exposed by putting the extreme case of the members of a corporation being by accident reduced till there is only one left, who thereupon unanimously appropriates the whole corporate property to his own use." A corporator, even if he holds all the shares, is not the corporation, and accordingly has no insurable interest in any parcel of its assets.¹⁰

The powers of a corporation are necessarily limited in some directions by the nature of things. There remains the question whether there are any general rules of law limiting them farther and otherwise. If our law had committed itself to the doctrine that the personality of a corporation is a mere fiction of the sovereign power, it might have been held as a natural consequence that a corporation could in no case have any powers except such as were conferred on it, expressly or by necessary implication, by the same act which created it. But this did not happen, and the judicial discussion of the subject has been evoked by the rapid growth of incorporated commercial and industrial societies in modern times, and guided by reason founded not in the nature of a corporation in itself, but in the need for safeguarding the interests partly of the individual members of companies, regarded as substantially partners in a joint undertaking, and partly of outside creditors dealing on the faith of apparently authorized acts and promises of their with companies, and looking to their corporate funds and credit, directors or agents. These two classes of interests are to some extent opposed, and the law has not reached the fairly settled condition in which it now stands without considerable fluctuations of opinion. On these, however, it is no longer needful to dwell at length.

"At common law a corporation created by the King's charter has . . . the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to" (subject to the corporate acts being sufficient in form, which we are not considering in this place). This rests on authority which, though it seems at times to have been forgotten, has never been disputed.¹¹

¹⁰ Sav. Syst. 3 329 199. §§ 97-100. The illustration in our text is given at p. 350, note, with the remark, "Hier ist gewiss Einstimmigkeit vorhanden."

¹¹ *Macaura v. Northern Assurance Co.* [1925] A. C. 619 (see per Lord Wrenbury *ad fin.*); 94 L. J. P. C. 154.

¹² *Bowen L. J.* in *Baroness Wenlock v. River Dee Co.* (1883) 36 Ch. D. 675, 685, n. *Semble* this applies to chartered companies of the modern politico-commercial type: *British S. Africa Co. v. De Beers Consolidated Mines* [1910] 1 Ch. 354; 79 L. J. Ch. 345, affirmed [1910] 2 Ch. 502, C. A. Cp. the Swiss Civil Code, art. 53: "Les personnes morales peuvent acquérir tous les droits et assumer toutes les obligations [sind aller Rechte und Pflichten fähig, German text] qui ne sont pas inséparables des conditions naturelles de l'homme, telles que le sexe, l'âge ou la parenté."

¹³ *Sutton's Hospital case* (1612) 10 Co. Rep., where it is said (at p. 30 b) that when a corporation is duly created, all other incidents are *facite* annexed. [Coke added that a restraint imposed by the charter of incorporation on alienation except in a certain form "is but a precept, and doth not bind in law." No direct decision adopting this statement is discoverable in later reports, but there are *obiter dicta*

SPECIAL PURPOSES OF INCORPORATION

But when a corporation is created directly by special statute, or indirectly by a statute authorizing the formation of a class of corporations on specified conditions, for purposes declared by the statute or which the founders of the corporation are required to declare, then the question is different. As to powers expressly conferred on the corporation or clearly authorized by general provisions, there can be no doubt when farther powers are claimed, it must be considered what was the intention of the Legislature, and only such powers can be attributed to the corporation as are necessary or reasonably incident to the fulfilment of the purposes for which it is established. Members of the company have the right to rely on those purposes not being exceeded: the public can ascertain them and have not any right to hold the company liable for undertakings outside them. On the whole, where there is an Act of Parliament creating a corporation for a particular purpose and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited, prohibited in the sense not that penalties or disabilities follow on such an act if done, but that the attempt to do it can from the first have no kind of validity as a corporate act.

The reasons for this rule, as we have hinted, are derived (1) from the law of partnership, (2) from principles of public policy.

1. In trading corporations the relation of the members or shareholders to one another is in fact a modified partnership, which in the view of courts of equity is governed by the ordinary rules of partnership law so far as they are not excluded by the constitution of the company.

of distinguished judges, in cases both at common law and in equity, which approve it. *Riché v. Ashbury Railway Carriage Co.* 1874, 1 R. 9, Ex. 224, 263, 292; *Wenlock Baroness v. River Dee Co.* 1883, 31 Ch. D. at 68, note Bowen L.J.; *Swinfen Eady v. British South Africa Co. v. De Beers Ltd.* [1910] 1 Ch. 354, 374, 376, but in the *C. A. Farwell L.J.* refused to express an opinion on this. [1910] 2 Ch. at 518. *Jenkins v. Pharmaceutical Society* [1912] 1 Ch. at 398, 399. There seems to be no sound reason for this distinction between corporations created by charter and those created by statute. The matter is discussed in detail in Salmond & Winfield *Contracts* 390, 392, where it is pointed out that there are two checks on abuse of its powers by a chartered corporation: first the Crown may cancel the charter; secondly, any corporation can claim an injunction to restrain the corporation from acts outside the scope of its charter which may result in its cancellation. *Jenkins' case* *supra*. *I. G. v. Manchester Corporation* [1906] 1 Ch. 643, 649, 651.

- * As to implied authority to do all things necessary for carrying out express authorities. *Druchar v. Gas Light and Coke Co.* [1924] 1 Ch. 322, affd [1924] 2 Ch. 426, C. A.
- * Lord Blackburn in *A-G v. G. I. Ry Co.* 1880, 1 App. Ca. 473, 481, stating the effect of *Ashbury Ry. Carriage and Iron Co. v. Riche* 1875, 1 R. 9, 11, 1653, 44 L. J. Ex. 185, a leading case on the Companies Act 1862, 25 & 26 Vict. c. 89, but not confined to the construction of that Act. See *Baroness Wenlock v. River Dee Co.* 1883, 10 App. Ca. 354, 360, 54 L. J. Q. B. 577. As to railway companies under special Acts see *A-G v. Mersey Ry. Co.* [1907] A. C. 415, 76 L. J. Ch. 568. Cp. as to the limited powers of a trade union, which is a peculiar kind of statutory quasi-corporation, *Amalgamated Society of Ry. Servants v. Osborne* [1910] A. C. 87, 79 L. J. Ch. 87.

- 10. Namely by provisions for transfer of shares, limited liability of shareholders, and other things which cannot (at least with convenience or completeness) be made incident to a partnership at common law.

Now it is a well-settled principle of partnership law that no majority of the partners can bind a dissenting minority, or even one dissenting partner, to engage the firm in transactions beyond its original scope. In the case, therefore, of a corporation whose members are as between themselves partners in the business carried on by the corporation, any dissenting member is entitled to restrain the governing body of the majority of the company from attempting to involve the company in an undertaking which does not come within its purposes as defined by its original constitution. Courts of equity have been naturally called upon to look at the subject chiefly from this point of view, that is, as giving rise to questions between shareholders and directors, or between minorities and majorities. Such questions do not require the court to decide whether an act which dissentients may prevent the agents of the company from doing in its name might not nevertheless, if so done by them with apparent authority, be binding on the corporate body, or a contract so made be enforceable by the other party who had contracted in good faith. This distinction was not always kept in sight. But further, according to the law of partnership a partner can bind the firm only as its agent—his authority is *prima facie* an extensive one,¹⁰ but if it is specially restricted by agreement between the partners, and the restriction is known to the person dealing with him, he cannot bind the firm to anything beyond those special limits. Limits of this kind may be imposed on the directors or other officers of a company by its constitution, and if that constitution is embodied in a special Act of Parliament, or in a deed of settlement or articles of association registered in a public office under the provisions of a general Act, it is considered that all persons dealing with the agents of the corporation must be deemed to have notice of the limits thus publicly set to their authority. The corporation is accordingly not bound by anything done by them in its name when the transaction is on the face of it in excess of the powers thus defined. And it is important to remember that in this view the resolutions of meetings however numerous, and passed by however great a majority, have of themselves no more power than the proceedings of individual agents to bind the partnership against the will of any single member to transactions of a kind to which he did not by the contract of partnership agree that it might be bound.

Irregularities in the conduct of the internal affairs of the body corporate, even the omission of things which as between shareholders and directors are conditions precedent to the exercise of the directors' authority, will not, however, invalidate acts which on the face of them are regular and authorized: third parties dealing

¹⁰ James L.J. *Bard's case* (1870) L. R. 5 Ch. 733. Story on Agency, §§ 124, 125 adopted by the Judicial Committee in *Bank of Australasia v. Brillat* (1847) 6 Moo. P. C. 152, 103; 79 R. R. 24, 53; Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 1.—R.

in good faith are entitled to assume that internal regulations (the observance of which it may be difficult or impossible for them to verify) have in fact been complied with.

But it is to be observed that in the ordinary law of partnership there is nothing to prevent the members of a firm, if they are all so minded, from extending or changing its business without limit by their unanimous agreement. As a matter of pure corporation law, the unanimity of the members is of little importance—it may supply the want of a formal act of the governing body in some cases,¹¹ but it can in no case do more. As a matter of mixed corporation and partnership law this unanimity may be all important as being a ratification by all the partners of that which if any one of them dissented would not be the act of the firm—for although the corporate body of which they are members is in many respects different from any ordinary partnership, it is treated, and justly treated, as a partnership for this purpose. It appears, then, that the unanimous assent of the members will remove all objections founded on the principles of partnership, and will so far leave the corporation in full possession of its common law powers. There are nevertheless many transactions which even the unanimous will of all the members cannot make binding as corporate acts. For the reasons which determine this we must seek farther.

2 Most corporations established in modern times by special Acts of Parliament have been established expressly for special purposes the fulfilment of which is considered to be for the benefit of the public as well as of the proprietors of the undertaking and for this reason they are armed with extraordinary powers and privileges. Whatever a corporation may be capable of doing at common law, there is no doubt that unusual powers given by the Legislature for a special purpose must be employed only for that purpose. If Parliament empowers either natural persons or a corporation to take J S's lands for a railway, J S is not bound to let them take it for a factory or to let them take an excessive quantity of land on purpose to re-sell it at a profit.¹² If Parliament confers

¹¹ Even this is in strictness hardly consistent with the principle that if A, B, C &c. are incorporated to them and their successors by the name of X, then A, B → C, &c. are not X.

¹² See *Galloupy v Mayor of London* 1866 1 R. 1 H. L. at 43, 45, 1 J. Ch. 477. *Lord Carrington v Wycombe Ry Co* (1868) 1 R. 4 Ch. 477 481, 47 1 J. Ch. 213. Nor may a company hold regattas or let out pleasure-boats to the inconvenience of the former owner on a piece of water acquired by them under their Act for a reservoir. *Borluck v N Staffordshire Ry Co* 1856 3 Sm. & G. 283 292, 2, L. J. Ch. 425. 99 R. R. 159 in Q. B. on a case sent by Parker v. (1855) 4 E. & B. 798, 99 R. R. 758 with some difference of opinion. nor alienate land similarly acquired except for purposes authorized by the Act. *Mulliner v Midland Ry Co* (1879) 11 Ch. D. 611, 622. 48 L. J. Ch. 258. But a statutory corporation acquiring property takes it with all its rights and incidents as against strangers subject only to the duty of exercising those rights in good faith with a view to the object of incorporation. *Swindon Waterworks Co v Wilts and Berks Canal Navigation Co* (1875) L. R. 7 H. L. 697, 704, 710, 45 L. J. Ch. 648. *Bonner v G. W. Ry Co* (1883) 24 Ch. Div. 1, and a corporation cannot bind itself not to use in the future special powers which have presumably been conferred to be used for the public good. *Avon Harbour Trustees v Oswald* (1883) 8 App. Cas. 623, *Tork Corporation v Henry Latham & Sons* [1924] 1 Ch. 557, 40 Times L. R. 371.

immunity for the obstruction of a navigable river by building a bridge at a specified place, that will be no excuse for obstructing it in the like manner elsewhere. Moreover we cannot stop here. It is impossible to say that an incorporation for special objects and with special powers gives a restricted right of using those powers, but leaves the use of ordinary corporate powers without any restriction. The possession of extraordinary powers puts the corporation for almost all purposes and in almost all transactions in a wholly different position from that which it would have held without them; and apart from the actual exercise of them it may do many things which it was otherwise legally competent to do, but which without their existence it could practically never have done. Any substantial departure from the purposes contemplated by the Legislature, whether involving on the face of it a misapplication of special powers or not, would defeat the expectations and objects with which those powers were given. When Parliament, in the public interest and in consideration of a presumed benefit to the public, confers extraordinary powers, it must be taken in the same interest to forbid the doing of that which will tend to defeat its policy in conferring them, and to forbid in the sense not only of attaching penal consequences to such acts when done, but of making them wholly void if it is attempted to do them. Accordingly contracts of railway companies and corporations of a like nature which can be seen to import a substantial contravention of the policy of the incorporating Acts are held by the courts to be void, and are often spoken of as *mala prohibita*, and illegal in the same sense that a contract of a natural person to do anything contrary to the provisions of an Act of Parliament is illegal. Others prefer to say that the Legislature acting indeed on motives of public policy, has simply disabled the corporation from doing acts of this class—to regard the case as one of incapacity to contract rather than of illegality, and the corporation as if it were non-existent for the purpose of such contracts. This appears the sounder, and is now the generally accepted view. However best expressed, the principle has not always been observed in usage. * [Payments

²² Blackburn J. in *Taylor v. Chester and Midland Ry. Co.* (1867) L. R. 2 Ex. at 379; 30 L. J. Ex. 217; and (Brett and Grove JJ. concurring) in *Riche v. Ashbury Ry. Carriage Co.* (1874) L. R. 9 Ex. at 262, 266; 43 L. J. Ex. 177. Lord Hatherley v. c. nom. *Ashbury Ry. Carriage Co. v. Riche* (1875) L. R. 7 H. L. at 689.

²³ Archibald J. L. R. 9 Ex. 293; Lord Cairns, L. R. 7 H. L. at 672; Lord Selborne id. 694. And Bramwell L. J. rather strongly disapproved of calling such acts illegal, pointing out that if they were properly so called there would have been some means of restraining them in a court of common law at the instance of the Crown. *A-G v. G. E. Ry. Co.* (1880) 11 Ch. Div. at 501-3.

¹ The agreement of a third person to procure a company to do something foreign to its proper purposes is plausibly called illegal. *MacGregor v. Dover and Deal Ry. Co.* (1852) 18 Q. B. 618; 22 L. J. Q. B. 69; and see per Erle J. in *Mayor of Norwich v. Norfolk Ry. Co.* (1855) 4 F. & B. 397; 24 L. J. Q. B. 105; 90 R. R. 518, but it is really void as being the promise of a performance impossible in law.

¹ In the earlier part of the eighteenth century chartered companies embarked freely on speculations wholly foreign to their prescribed objects. The Sword-blade Company was a flagrant case. Select Charters of Trading Companies, ed. Carr (Seld. Soc. 1913), Introd. p. cxxii.

made in pursuance of a contract *ultra vires* (i.e., one which it is beyond the powers of the corporation to make; Pollock eschews use of the term, *ultra vires*) cannot be recovered by the quasi-contractual action for money had and received.¹⁷

There is another consideration of a somewhat similar kind which applies equally to what may be called public companies in a special sense—i.e., such as are invested with special powers for carrying out defined objects of public interest—and ordinary joint-stock companies which have no such powers. The provisions for limited liability and for the easy transfer of shares in both sorts of companies must be considered, in their modern form and extent at least, as a statutory privilege. These provisions also invest the companies with a certain public character and interest apart from the nature of their particular objects in each case, but derived from the fact that they do professedly exist for particular objects. By far the greater part of their capital represents the money of shareholders who have bought shares in the market without any intention of taking an active part in the management of the concern, but on the faith that they know in what sort of adventure they are investing their money, and that the company's funds are not being and will not be applied to other objects than those set forth in its constitution as declared by the act of incorporation, memorandum of association, or the like.¹⁸ This is not a mere repetition of the objections grounded on partnership law: the incoming shareholder may protect himself for the future, but the mischief may be done or doing at the time of the purchase—more over persons other than shareholders deal with the company on the faith of its adhering to its defined objects. They are entitled to “know that they are dealing with persons who can only devote their means to a given class of objects and who are prohibited from devoting their means to any other purpose.”¹⁹ The assent of all those who are shareholders at a given time will bind them individually, but it will not bind others.²⁰ If I buy shares in a company which professes to make railway plant in England I have a right to assume that its funds are not pledged to pay for making a railway in Spain or Belgium, and it is the same if dealing with it as a stranger I lend money or otherwise give credit to it. Accordingly the provisions of the Companies Acts are to be considered as having been enacted in the interests of “in the first place, those who might become shareholders in succession to the persons who

¹⁷ [*Sinclair v. Brougham* [1914] A. C. 398, 83 L. J. Ch. 465, where, however, substantial justice was done by means of a tracing order—see Lord Wright, *Legal Essays* (1939), 133.]

¹⁸ Held, on full consideration of authorities, that the articles of a company under the Companies Act are a contract not only between the members but between the company and its members, *Hickman v. Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch. 881, 84 L. J. Ch. 688. [Approved by C. A. in *Beattie v. Beattie, Ltd.* [1938] Ch. 708, 107 L. J. Ch. 393.]

¹⁹ Lord Hatherley, L. R. 7 H. L. at 684.

²⁰ See L. R. 9 Ex. 270, 291.

were shareholders for the time being; and, secondly, the outside public, and more particularly those who might be creditors of companies of this kind."⁴¹ Accordingly it is settled that a company registered under the Companies Act is forbidden to enter, even with the unanimous assent of the shareholders for the time being, into a contract foreign to its objects as defined in the memorandum of association.⁴²

It is not within our scope to discuss the particular contracts which particular corporate bodies have been held incapable of making. One class of contracts, however, is in a somewhat peculiar position in this respect, and requires a little separate consideration. We mean the contracts expressed in negotiable instruments and governed by the law merchant. As a general rule a corporation cannot bind itself by a negotiable instrument. This is not because a corporation cannot be presumed to have power to do so, but, in the first place, because of the general rule of form that the contracts of a corporation must be made under its common seal.⁴³ It follows from this that a corporation cannot generally be bound by negotiable instruments in the ordinary form. The only comparatively early authority which is really much to the point was argued and partly decided on this footing. But the corporate seal may now take the place of signature in bills and notes, and transferable debentures under a company's seal have been held to be negotiable.⁴⁴ Thus the objection of form does not seem of great importance in modern practice. The question of authority to bind the company in substance is more serious. It may be asked, why should not the agents who are authorized to contract on behalf of a company in the ordinary course of its business be competent to bind the company by their acceptance or indorsement on its behalf just as a member of an ordinary trading partnership can bind the firm? There is a twofold answer. First the extensive implied authority of an ordinary partner to bind his fellows cannot be applied to the case of a numerous association whether incorpor-

⁴¹ Lord Cairns 1 R. 7 H. L. at 667.

⁴² *Ashbury R. Carriage and Iron Co. v. Riche* 187, 1 R. 7 H. L. 653, 44 L. J. Ex. 18, [For an American criticism of the decision see Prof. Edward H. Warren in 2 Cambridge Law Journal 185, seq., and a reply by Prof. A. L. Goodhart, *ib.* 354, seq.] See Note 4 in Appendix for some further account of the authorities by which the rules were settled in the latter part of the nineteenth century. It is hardly needful to add that the consolidating Acts have made no change in the principles of the law.

⁴³ As to the United States, see p. 105.

⁴⁴ See more as to this in the following chapter.

⁴⁵ *Broughton v. Manchester Waterworks Co.* 1819 3 B. & Ald. 1, 22 R. R. 278. The chief point was on the statutes giving the Bank of England exclusive rights of issuing notes, &c., within certain limits. In *Murray v. E. India Co.* (1821) 5 B. & Ald. 204, 24 R. R. 325, the statutory authority to issue bills was not disputed, a difficulty was raised as to the proper remedy, but disposed of in the course of argument. 5 B. & Ald. 210, 24 R. R. 330. Other cases at first sight like these relate to the authority of particular agents to bind a corporate—or unincorporated—association irrespective of the theory of corporate liabilities. See note 46.

⁴⁶ Bills of Exchange Act, 1882, s. 91.

⁴⁷ *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q. B. 658, 67 L. J. Q. B. 987; *Edelstein v. Schuler & Co.* [1902] 2 K. B. 144, 71 L. J. K. B. 578.

ated or not, whose members are personally unknown to each other, and it has been often decided that the managers of such associations cannot bind the individual members or the corporate body, as the case may be, by giving negotiable instruments in the name of the concern, unless the terms of their particular authority enable them to do so by express words or necessary implication." In the case of a corporation this authority must be sought in its constitution as set forth in its special Act, articles of association, or the like. Secondly, the power of even a trading corporation to contract without seal is limited to things incidental to the usual conduct of its business. But, as was pointed out by a judge who was certainly not disposed to take a narrow view of corporate powers, a negotiable instrument is not merely evidence of a contract but creates a new contract and a distinct cause of action, and "it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or not according as the consideration between the original parties was good or bad", and it would be most inconvenient if one had in the case of a corporation to inquire whether "the consideration in respect of which the acceptance is given is sufficiently connected with the purposes for which the acceptors are incorporated".

The result seems to be that in England a corporation can be bound by negotiable instruments only in the following cases:—

1. When the negotiation of bills and notes is itself one of the purposes for which the corporation exists—within the very scope and object of their incorporation—as with the Bank of England and the East India Company—and it is presumed financial companies generally—and perhaps even all companies whose business wholly or chiefly consists in buying and selling.

2. When the instrument is accepted or made by an agent for the corporation whom its constitution empowers to accept bills, &c., on its behalf, either by express words or by necessary implication.

The extent of these exceptions cannot be said to be very precisely defined, and in framing articles of association and similar instruments it is therefore desirable to insert express and clear provisions on this head.

⁹⁹ As to unincorporated joint stock companies: *Noble v. Furlon* (1827) 4 Bing. 149, 29 R. R. 531; *Duckinson v. Fulps* (1829) 10 B. & C. 128, 31 R. R. 348; *Bramah v. Roberts* (1837) 3 Bing. N. C. 963; *Ridley v. Morrell* (1840) 12 A. & E. 745; 34 R. R. 681; *Brown v. Byers* (1847) 16 M. & W. 252, 16 L. J. Ex. 112. As to incorporated companies: *Noble v. Harmer* (1845) 14 M. & W. 831 (in Ex. Ch. 4 Ex. 1, not on this point); *Thompson v. Universal Saltage Co.* (1848) 1 Ex. 694; 17 L. J. Ex. 118; *Re Peruvian Ry. Co.* (1867), L. R. 2 Ch. 617, 36 L. J. Ch. 864; cp. *Ex parte City Bank* (1868) L. R. 3 Ch. 748, per Selwyn J. J. The two last cases go rather far in the direction of implying such a power from general words.

¹⁰⁰ Per Erie C. J. *Bateman v. Mid Wales Ry. Co.* (1866) L. R. 1 C. P. 499, 509; 35 L. J. C. P. 205. Railway companies are expressly forbidden to issue negotiable or assignable instruments without statutory authority, on pain of forfeiting the nominal amount of the security: 7 & 8 Vict. c. 85, s. 19.

¹⁰¹ Per Montague Smith J. L. R. 1 C. P. 512; *Ex parte City Bank* (1868) L. R. 3 Ch. 748.

[For further details, see Street, *Ultra Viris* (1930), 182--191.]

In the United States the Supreme Court has decided that local authorities having the usual powers of administration and local taxation have not any implied power to issue negotiable securities which will be indisputable in the hands of a *bona fide* holder for value," and has been equally divided on the question whether municipal corporations have such power." It seems, however, that in American Courts a power to borrow money is held to carry with it as an incident the power of issuing negotiable securities," and it is held everywhere as settled law that in general a corporation may issue negotiable promissory notes for any of the legitimate purposes for which the company is incorporated."

The common law doctrine of estoppel," and the kindred equitable doctrine of part performance," apply to corporations as well as to natural persons. Even when the corporate seal has been improperly affixed to a document by a person who has the custody of the seal for other purposes, the corporation may be bound by conduct on the part of its governing body which amounts to an estoppel or ratification, but it will not be bound by anything less." The principles applied in such cases are independent of contract and therefore no difficulty arises from the want of a contract under the corporate seal or non-compliance with statutory forms. But it is conceived that no sort of estoppel, part performance, or ratification can bind a corporation to a transaction which the Legislature has in substance forbidden it to undertake, or made it incapable of undertaking.

⁵² *Police Juris. Bristol* 1872 15 Wallace 760, 772.

⁵³ *The Mayor of Nashville v. Ray* 1873 19 Wallace, 460. "The weight of authority is against their having such power." Prof. Williston's note to third American edition of this work 1906.

⁵⁴ *Police Juris v. Brutton*, 15 Wallace, 766.

⁵⁵ Prof. Williston's note *op. cit.* at p. 144. [The authorities are collected in the American *Corpus Juris*, vol. 14 A, 1921, §§ 2310, 2317, pp. 452, 461.]

⁵⁶ *Webb v. Herne Bay Commissioners* 1870 1 L. R. 5 Q. B. 642, 39 L. J. Q. B. 221.

⁵⁷ *Wilson v. West Hantspool Ry. Co.* 1864-5 2 D. J. S. 475, 493, per Turner, L. J. 34 L. J. Ch. 241. *Crook v. Corporation of Seaford* 1871 1 L. R. 6 Ch. 751; *Malbourne Banking Corporation v. Brougham* 1878-9 4 App. Ca. at 160; 48 L. J. P. C. 12. This must be confined however to cases where the corporation is "capable of being bound by the written contract of its directors as an individual is capable of being bound by his own contract in writing" per Cotton L. J. *Hunt v. Wimbledon Local Board* 1878 4 C. P. Div. at 62, 48 L. J. C. P. 207. See further *Howard v. Patent Ivory Manufacturing Co.* 1888 38 Ch. D. at 162, 163, and cases collected in Lindley on Companies, 6th ed. i, 272.

⁵⁸ *Bank of Ireland v. Evans (Charles)* 1875 5 H. L. C. 380, 101 R. R. 218; *Merchants of the Staple v. Bank of England* 1887 21 Q. B. Div. 160, 57 L. J. Q. B. 418; *Ruben v. Great Fungall Consolidated* [1906] A. C. 430, 75 L. J. K. B. 843.

3

FORM OF CONTRACT

1. FORMALITY IN EARLY ENGLISH LAW

THE law of contract exists chiefly for the security of men in their daily business, conducted in many different modes from hour to hour, and in whatever mode suits the circumstances, by word of mouth (including telephone), written agreement, letter, or telegraph. Hardly any limit can be set to the diversity of forms in which men bargain with one another, but business in the commercial sense has this common feature in all its branches, that it depends on bargain of some kind. Therefore the Common Law does not, as a general rule, require any particular form in contracts, provided that there is a bargain intended to be binding, though in certain cases evidence in writing is required for special reasons of precaution or by mercantile custom embodied in the law, and in some cases formalities are imposed for the protection of the revenue. Transactions of bounty on the other hand are not in the ordinary way of business, and if a man wants to bind himself without bargain or to dispense with proof of a bargain, he must do so with a certain amount of solemnity (reduced, however, to a matter of no great trouble or necessary cost in modern practice) by expressing his promise in a deed. Accordingly agreements made for valuable consideration are subject to conditions of form only by way of exception in particular cases, but solemn form is necessary to make a gratuitous promise binding. In some such words as the foregoing the broad principles of our modern law, and the reasons which make us fairly content with it as it stands, may be stated with tolerable accuracy. But such a statement would be misleading if taken as implying the assertion that the law came to be what it is by any such logical process. English law started from a ground-work of archaic Germanic ideas not unlike those of the early Roman law, and quite unrelated to the common sense of a modern man of business. Form and ceremony were everything, substance and intention were nothing or almost nothing. Only those transactions were recognized as having legal efficacy which fulfilled certain conditions of form, and could be established by one or other of certain rigidly defined modes of proof. The proof itself was formal and when once duly made conclusive. The history of this branch of our law, through the Middle Ages and even later, consists of the transition from the ancient to the modern way of thinking.

Taking English courts and the remedies they administered as they were about the middle of the thirteenth century (for it is

needless to go farther back for our present purpose),¹ we find that what we should call elaborate contracts or covenants, and of sufficiently varied kinds, can be annexed to grants of land and interests in land, but there is very little independent law of contract, and, if by a law of contract we mean a law which enforces promises as such, it can hardly be said that there is any at all. Still less is there any theory or system of the law. Those who aim at having one must go to the now rising Continental science of Roman law, and gather crumbs from the tables of the renowned glossators. Bracton, so far as he has a system, copies Azo of Bologna with variations largely due to the impossibility of contradicting the actual English practice.² But the only classification for which the practical English lawyer cares is a classification of forms of action, process and remedies. Bracton was largely read and used, and was more or less closely followed by the unknown authors of the books called *Button* and *Fleta*, but his Roman or Romanized arrangements of legal topics never acquired any authority, and produced no effect whatever on the registers of writs or on the technical vocabulary of pleaders. English lawyers would not believe—and on the whole were right in not believing—that an English charter had anything to do with the Roman rules about the verbal contract by stipulation, or in appeal of felony with an action under the *Lex Aquilia*.

The only modes of proof known to early Germanic law were oath and ordeal. The archaic oath is not a confirmation of testimony open to discussion, but a one-sided oath of the party and his helpers. It may be preliminary, for the purpose of giving him a standing before the Court, or final and decisive. One regular form of deciding issues on the Continent, but not in England until it was introduced from Normandy, was trial by battle, not material in the history of this part of the law, but still theoretically possible in an action of debt as late as the time of Henry II.³ Ordeal, abolished in the thirteenth century, was confined to criminal matters. Proof by writing is ultimately of Roman origin, but was adopted by the Germanic nations of the Continent at an early time. Duel and writing are the two normal modes of proof in the King's Court in the twelfth century. The charter or deed of medieval English law was not a continuation of the Anglo-Saxon "book," but a Norman importation, representing the Frankish branch of

¹ There was practically no secular law of contract before the Norman Conquest. See Pollock & Maitland *Hist. Eng. Law*, 1, 57, 2nd ed., "English law before the Norman Conquest," by the present writer, *L. Q. R.* xiv, 291, 303, reprinted as appendix to "The Expansion of the Common Law," Lond. 1904, at 155, and in *Select Essays in Anglo-American Legal History*, 1907, 1, 88.

² See F. W. Maitland's "Bracton and Azo," *Selden Society* 1895. The part of misunderstanding is now shown to be less than formerly supposed. Prof. Woodbine's critical edition makes it clear that some variations of which it is hard to see the purpose are at any rate not accidental.

³ "Actio legis Aquiliæ de hominibus per feloniam occisus vel vulneratus." Bracton, fo. 103 b.

⁴ *Glanv.* x, 12.

⁵ *Glanv.* x, 17.

what we may call Roman conveyancing tradition.⁶ Now the old Roman formal contract, the stipulation by question and answer, had been practically transformed into a written contract even before the legislation of Justinian;⁷ and *stipulatio* or *adstipulatio* had long since, in Continental conveyancing, become a name for the signing or execution of a written instrument.⁸

Thus the charter came to us with all the historical dignity of the most solemn form of obligation known to Roman law,⁹ and if this was not enough its authority was completed by the fact that all proof was formal in Germanic law and was conclusive when once made in due form. "Proof was what satisfied the law, not what satisfied the Court." A deed was and subject to grounds of exception admitted only at a later time, still is binding, not because it records this or that kind of transaction but by the form of the record itself. And, when a promise to pay money was recorded in a deed the action which the promisee could bring was not an action on the promise.

The remedy to recover money secured by deed was the action of debt, which retained its essential form and characters through the whole history of common law procedure so long as the forms of action were preserved at all. This was a writ of right for chattels, an action not to enforce a promise but to get something conceived as already belonging to the plaintiff: it was called an action of property as late as the Restoration—a conception which lingers even in some of Blackstone's language. A promise where it was operative at all operated not by way of obligation but as a grant of the sum expressed. It was a good defence that the party's seal had been lost and affixed by a stranger without his knowledge—at least if the owner had given public notice of the loss—but not if it had been misapplied by a person in whose custody it was for

⁶ The English charter of feoffment and memorandum of livery of seisin are really the *carta* and *notitia* familiar in Continental practice as early as the ninth century. As to the history of the evidential value of writing see Prof. J. H. Wigmore in *Columbia Law Rev.* iv, 338.

⁷ Brunner, *Zur Rechtsgeschichte der römischen und germanischen Urkunde* 63, [Buckland *Text Book of Roman Law* 2nd ed. 1932 435, 437]. Mowle's Justinian, 4th ed. 401, 416.

⁸ Brunner, *Röm. u. Germ. Urkunde* 220, 399. For an English example see *Kemble* (C. D. No. 623).

⁹ The summary view of the Roman classification of contracts formerly given in this chapter was written at a time when English text-books on Roman law were few and trustworthy ones fewer. It is now, perhaps, needless but is preserved in the Appendix, Note 5, in case it may be sometimes useful for immediate reference.

¹⁰ Salmond, *Essays in Jurisprudence*, &c., 16.

¹¹ The action of *assumpsit* was said by Vaughan C. J. to be "much inferior and ignobler than the action of debt which by the Register is an action of Property." *Edgcomb v. Doe* (1670) Vaugh. at p. 101.

¹² *Harv. Law Rev.* vi, 399, "contracts of debt are reciprocal grants." *Edgcomb v. Doe* last note.

¹³ Glanvill (L. 10, c. 12) has not even this. Britton (ed. Nichols, vol. 1, 166, as in the text: "Pur ceo qe il ad conu le fet estre soen en partie, soit agarde pur le pleyntif, et se purveye autre fois le defendaut de meillour gardeyn." Cp. *Fleta*, i, 6, c. 39, § 2, c. 34, § 4. The practice of publishing formal notice in case of loss really existed. Blount's *Law Dictionary*, s. v. *Sigillum* (18 Ric. II.) In modern law such questions, when they occur, come under the head of estoppel.

then, it was said, it was his own fault for not having it in better keeping. An action of debt¹⁴ might also be brought, without proof by deed, for such things as money lent, or the price of goods sold and delivered, and an action of detinue (which was but a species of debt) for chattels bailed,¹⁵ the cause of action being still not any promise by the defendant but his possession of the plaintiff's money (so it was conceived) or goods. The first thing needful to found the action of debt was, as it still is in jurisdictions where the old forms of action persist, that a certain sum of money should be payable by the defendant to the plaintiff. In debt and detinue the text-writers could profess to recognize the Roman *contractus innominati* (*do ut des*, &c.) which Bracton, carrying out the medieval notion that a promise to pay or deliver is a grant immediate in execution and only suspended in operation, put under the head, strange to us nowadays, of conditional grants.¹⁶ In the course of the next two centuries we find it quite clear that an action of debt, provided the sum be liquidated, will lie (as we should now say) on any consideration executed, and also that on a contract for the sale of either goods or land an action may be maintained for the price before the goods are delivered or seisin given of the land. In 1294 it was said that money paid as the price of land might be recovered back in debt if the seller would not enfeof the buyer pursuant to his covenant.¹⁷

Other remedies applicable to contracts were of limited scope and utility. The action of covenant, of which we do not hear before the thirteenth century, was grounded on agreement, *conventio*, both in form and in fact, but it was practically confined to agreements relating to interests in land. Attempts at extending it were cut short by the establishment, after some vacillation, of the rule that writing under seal was the only admissible proof; so that in the modern common law covenant is the proper name of a promise made by deed. The writ of covenant remained a solitary and barren form of action without influence on the later development of the law.¹⁸

¹⁴ For fuller statement see Pollock & Maitland *Hist. Eng. L.* ii, 210.

¹⁵ Detinue proper lay only for specific chattels—a claim for delivery of goods not yet identified was debt in the *detina*. per Maule J. 15 C. B. 303. The decision of the C. A. in *Briant v. Habbet* 1878 (1 C. P. Div. 389, 47 L. J. C. P. 670, that an action for wrongful detention is founded on tort) within the meaning of the County Court Acts is and professes to be beside the historical question.

¹⁶ Bracton 186, 190, ii, 70, 71, ed. Woodbine vol. 1, consists of critical prolegomena). Prof. Woodbine has corrected several corruptions in the vulgate text. *Fleta* 1. 2 c. 60 § 23.

¹⁷ Y. B. 12 Ed. III (Rolls ed.) 387 [A.D. 1338] Mich. 37 H. VI [A.D. 1450] 8, pl. 18 by Priot C. J., where it is added that in the case of goods sold, though not of land, the buyer may take the goods—thus follows from the theory of "reciprocal grant".

¹⁸ Y. B. 21 & 22 Ed. I (Rolls ed.), 598–600, per Mettingham. The principal action was apparently a quite regular action of debt on covenant; the argument is curious but on points outside the present subject.

¹⁹ See Pollock & Maitland, ii, 216; Harv. Law Rev. vi, 399–401, and Prof. Plucknett in H. L. R. xlii, 660. The Statutum Walliac [A.D. 1284] is the most instructive document. The suggestion in Blackstone, Comm. iii, 158, that Assumpsit is an action on the case analogous to the writ of covenant, is quite unhistorical, though ingenious.

The action of account" was a remedy of wider application (sometimes exclusively, sometimes concurrently with debt) to enforce the claims of the kind which in modern times have been the subject of actions of assumpsit for money had and received or the like. It covered apparently all sorts of cases where money had been paid on condition or to be dealt with in some way prescribed by the person paying it.² One must not be misled by the statement that "no man shall be charged in account but as guardian in socage bailiff or receiver."³ for it is also said "a man shall have a writ of account against one as bailiff or receiver where he was not his bailiff or receiver for if a man receive money for my use, I shall have an account against him as receiver or if a man deliver money unto another to deliver unto me I shall have an account against him as my receiver." This action may be brought by one partner against another.⁴ At common law it could not be brought by executors except it seems in the case of merchants nor against them unless at the suit of the Crown but it was made applicable both for and against executors by various statutes to which it is needless to refer particularly.⁵ In modern times this action was obsolete except as between tenants in common.⁶ Like the action of debt it was in the nature of a writ of right and founded not on a promise but on the duty—in this case not of paying a sum certain but of rendering an account—attached by law to the defendant's receipt of the plaintiff's money. Nevertheless it is a probable opinion that it had a considerable share in enluring the conceptions of English lawyers as to quasi-contractual duties which were in course of time developed in the form of assumpsit.

On informal executory agreements there was in general no remedy in the King's Courts.⁷ The Ecclesiastical Courts however enforced them freely in suits *pro lacrone fidei* within (and sometimes it would seem not within) the limits set by the Constitutions of Clarendon and defined later by the royal writ of *Circumspecte agatis*, which somehow not without judicial dissent⁸ acquired the reputation of being a statute.⁹ Executory mercantile

² 5 Hen. III. Stat. Marlbr. 1267 c. 17; 13 Ed. I. Stat. Westminster 2 1285 c. 23. For more history and details see Langbein in Harv. Law Rev. II 249, 251.

³ See cases in 1 Rol. Abr. 116.

⁴ 11 Co. Rep. 89 Co. Litt. 172.

⁵ 1 N. B. 116 Q.

⁶ 117 D. Langdell disputes this note.²⁰ but Fitzherbert is clear and express on the point.

Co. Litt. 90 b. and see *Earl of Devonshire case* 1606 11 Rep. 89.

⁷ The action is given against executors by 3 & 4 Ann. c. 3 Rev. Stat. 4 Ann. c. 16 in Ruffhead s. 27.

⁸ [The remedy is not now obsolete see Judicature Act 1925 15 & 16 Geo. 5 c. 49 s. 56 and Rules of Supreme Court Ord. 3 rule 8 Ord. 15 rule 1.]

⁹ See Sir W. Holdsworth in agreement with Ames, H. E. I. III 428.

¹⁰ See further Ames "Parol Contracts prior to Assumpsit," Harv. Law Rev. viii 252 reprinted in Essays in Anglo-American Legal History in 304.

¹¹ Harv. Law Rev. vi 403; Pollock & Maitland H. E. L. II, 200.

¹² See the remarks of two judges in Y. B. 19 Ed. III, ed. Pike, 1906 "Hillory. That is not a statute sealed Willoughby. No, the Prelates made it themselves."

¹³ Doubts of long standing were finally cleared up as late as 1928 by Mr. E. B. Graves in a very learned article founded on critical study of the MS. material, E. H. R.

contracts were also recognized in the special courts which administered the law merchant. But we cannot here attempt to throw any light on that which Lord Blackburn found to be one of the obscurest passages in the history of English law.²² We read of exceptions by local custom in London and Bristol, but one may guess that the allegation of such customs was only a device to bring the rules of the law merchant within the jurisdiction of the King's Court.²³

2. THE ACTION OF ASSUMPSIT

In the later Middle Ages a general remedy became indispensable but it was introduced from a different branch of the law and by a device which at first was thought too bold to succeed. This was a new variety of action on the case framed, it seems, as often on the writ of deceit 'as on that of trespass, and it ultimately became the familiar action of assumpsit and the ordinary way of enforcing simple contracts. Failure to perform one's agreements did not create a debt but it was found to be a wrong in the nature of deceit for which there must be a remedy in damages. The final prevalence of assumpsit over debt like that of trover over detinue, was much aided by the defendant not being able to wage his law and by the greater simplicity and latitude of the pleadings, but the reason of its original introduction was to supply a remedy where no other action would lie. This was not effected without dispute and dissent. In the first recorded case,²⁴ the action was against a carpenter for having failed to build certain houses as he had contracted to do. The writ ran thus: *Quare cum idem T* [the

shut it, and noticed at the time in L. Q. R. xlv. 127. It appears that the current printed text is late and corrupt and that there were two distinct documents, apparently both issued in June or July 1286. Mr. Graves gives us an amended text. The writ follows a royal inquiry held in 1287 into the jurisdiction exercised by the clergy of the diocese of Norwich wherein the King's commissioners appear to have tempered their excessive zeal by exacting unconscionable fees.

²² Blackburn on the Contract of Sale 207, 208. In addition to the quotation there from the Year Book of E. I. IV. see V. B. 21 & 22 Ed. I. p. 458. And see Sir John Macdonell's Introduction to Smith's Mercantile Law, 11th ed. 1890. A. T. Carter, History of English Legal Institutions, 3rd ed. 1906, p. 260.

²³ F. N. B. 146 a, Liber Albi 101 v. 14 H. IV. 26 a pl. 53. Godb. 49, 56. Siv. 145. 108, 199, 228. Latch. 53. 1 Leo. 2. 3 Leo. 105.

²⁴ The breach of promise alleged to be mixed with fraud and deceit to the special prejudice of the plaintiff and for that reason it is called 'trespass on the case'. *Punchon's case* 1641, 4 Co. Rep. at 89.

²⁵ No man hath property by a breach of promise but must be repaired in damages. Vaughan C. J. in *Edgcomb v. Dice* (1670) Vaughan, at 101.

²⁶ See per Martin B. *Burrough v. Bayne* 1860, 5 H. & N. at 301, 29 L. J. Ex. 188.

²⁷ Mich. 2 H. IV. 3 b pl. 9. The full and careful historical discussion of the whole subject by the late Prof. Ames of Harvard in *Harv. Law Rev.* II, 1, 53, republished in *Select Essays* in 1890 and to some extent supplemented in his posthumously collected *Lectures on Legal History*, 1913, superseded all previous research. Advanced students will of course consult this. What is said here was in its original form written more than sixty years ago when the critical study of English medieval law was still in its infancy, as since revised, it is believed to be correct so far as it goes. Actions of trespass on the case had previously been allowed for malfeasance by the negligent performance of contracts (for which it is still held that there is an alternative remedy in contract and in tort), but an action for mere nonfeasance was a novelty. An excellent continuous narrative is now given by Sir W. Holdsworth, *Hist. Eng. Law*, in 417—454, 3rd ed.

defendant] ad quasdam domos ipsius Laurentii [the plaintiff] bene et fideliter infra certum tempus de novo construend' apud Grimesby assumpsisset, praedictus tamen T. domos ipsius L. infra tempus praedictum, &c., construere non curavit ad dampnum ipsius Laurentii decem libr'. &c." The report proceeds to this effect:—

"*Tirwit*—Sir, you see well that his count is on a covenant, and he shows no such thing: judgment.

Gascoigne—Seeing that you answer nothing, we ask judgment and pray for our damages.

Tirwit—This is covenant or nothing (*ceo est increment un covenant*).

Brenchesley J.—It is so: perhaps it would have been otherwise had it been averred that the work was begun and then by negligence left unfinished.

(*Hankford J.* observed that an action on the Statute of Labourers might meet the case.)

Rickhill J.—For that you have counted on a covenant and show none, take nothing by your writ but be in mercy."

The word *fideliter* in the writ is significant. It seems to denote a deliberate competition with the jurisdiction of the Courts Christian in matters of *fidei laesio*. We will show you, the pleader says in effect, that the King's judges too know what belongs to good faith, and will not let breach of faith go without a remedy. It may also have been intended to show that there was a bargain and mutual trust."

This adverse decision was followed by at least one like it," but early in the reign of Henry VI. an action was brought against one Watkins for failure to build a mill within the time for which he had promised it, and two out of three judges (Babington C.J. and Cockaine J.) were decidedly in favour of the action being maintainable and called on the defendant's counsel to plead over to the merits." Martin J. dissented, insisting that an action of trespass would not lie for a mere non-feasance: a difficulty by no means frivolous in itself. "If this action is to be maintained on this matter," he said, "one shall have an action of trespass on every agreement that is broken in the world." This, however, was the very thing sought, and so it came to pass in the two following

¹¹ Modern pleading would require, of course, a much more distinct averment of consideration: but the doctrine was not yet formed.

¹² Mich. 11 H. IV. 33, pl. 60.

¹³ Hil. 3 H. VI. 36, pl. 33. There is some doubt as to the date of this case—see L.Q.R. xxiv, 384. Notwithstanding the favourable view taken by several judges—see further, 14 H. VI. 18, pl. 58—the point remained open for many years, see 19 H. VI. 49, pl. 5. In *Dolge's case* a little later, 20 H. VI. 34 [A.D. 1442], and now from original MSS. in Miss Hemmant's Select Cases in the Exchequer Chamber, Selden Society, 1933, p. 97, we see a distinct advance in judicial opinion though the result is not stated: see especially the arguments of Newton and Paston JJ., who saw no difficulty in a bill of deceit being an optional remedy even where covenant would lie. For fuller comment, Holdsworth, H. E. L. iii, 435.

reigns, when the general application of the action of *assumpsit* was well established. But only in 1602 was it conclusively decided that *assumpsit* was admissible at the plaintiff's choice even where debt would also lie.⁴¹ The fiction of the action being founded on a tort was abolished by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76) ss. 49, 74.⁴²

Meanwhile the relation between the parties which was assumed as the foundation of the duty violated by the defendant, and which involved the plaintiff's having in some way changed his position for the worse on the faith of the defendant's undertaking,⁴³ was transformed into the modern doctrine of Consideration, coalescing on the way, in fact if not in strict theory, with the existing requirements of the actions of debt and account. Of this we shall speak separately.

It is stated in several books of authority (*e.g.*, Shepp. Touchst. 54) that a deed must be written on parchment or paper, not on wood, &c. This seems to refer to the then common use of wooden tallies as records of contract. Fitzherbert in fact says⁴⁴ that if such a tally is sealed and delivered by the party it will not be a deed; and the Year Books afford evidence of attempts to rely on sealed tallies as equivalent to deeds, and it appears that by the custom of London they were so. These tallies were no doubt written upon as well as notched, so that nothing could be laid hold of to refuse them the description of deeds but the fact of their being wooden. the writing is expressly mentioned in one case,⁴⁵ and the Exchequer tallies used till within recent times were likewise written upon.⁴⁶

⁴¹ *Slade's case*, 4 Co. Rep. 61 c. in Ex. Ch. It was till later before it was admitted, that the substantial cause of action in *assumpsit* was the contract. O. W. Holmes, *The Common Law*, 284-287. For the earlier history see Ames and Holdsworth, *ubi sup.*

⁴² [The part played by Equity in the development of contract is traced by Prof. W. T. Barbour in 'The History of Contract in early English Equity' (1914), embodied in vol. ix of *Oxford Studies in Social and Legal History* (ed. Vinogradoff).]

⁴³ "In all these cases there is an undertaking and matter of fact beyond that which sounds in covenant." Newton in 14 H. VI. 18.

⁴⁴ F. N. B. 122.1.

⁴⁵ "Un taille de deute n'est pas usage de la cite est aux tort come une obligacoun." Laver. Albus, 191 a.

⁴⁶ Trin. 12 H. IV. 23 pl. 3. The other citations we have been able to verify are Pasch. 25 Ed. III. B3 wrongly referred to as 40 in the last case and in the margin of Fitzh. 1, pl. 9, where the reporter notes it is said to be otherwise in London; and Trin. 44 Ed. III. 21 pl. 23. For a case where the Court was favourable to a merchant's tally, see *Middlesex Iter*, 22 Ed. I. 158.

⁴⁷ See account of them in Hall, *Antiquities of the Exchequer*, 118-199. H. Jenkinson in *Proc. Soc. Antiq.* 2d S. xxx, 29-xxxv, 36; *Archæol.* 2d S. vii, 367. The French (art. 1333) and Italian (art. 1332) Civil Codes expressly admit tallies as evidence between traders who keep their accounts in this way, nor is the use of them unknown at this day in England. By the courtesy of the late Mr. J. B. Matthews, K.C., formerly of Worcester I have a specimen of the tallies with which the hop-pickers in Herefordshire kept (if they do not still keep) account of the quantities picked. They were similarly used in the Kentish hop country, and in Hampshire and in co. Galway. Bakers' tallies are believed to be still common throughout France. Specimens of English tallies both ancient and recent may be seen in the medieval room of the British Museum, and at the Record Office. Cp. Col. Yule's note on Marco Polo, ii, 78, 2nd ed., and Savings of Lao-tzu (tr. J. Giles, "Wisdom of the East" series), 29.

3—MODERN REQUIREMENTS OF FORM

FORMAL CONTRACTS

We have seen how in the ancient view no contract was good (as indeed no act in the law was) unless it brought itself within some favoured class by satisfying particular conditions of form, or of evidence or both. The modern view to which the law of England has now long come round is the reverse, namely that no contract need be in any particular form unless it belongs to some class in which a particular form is specially required.

Before we say anything of these classes it must be mentioned that contracts under seal are not the only formal contracts known to English law. There are certain so-called "contracts of record" which are of a yet higher nature than contracts by deed. The judgment of a Court of Record is treated for some purposes as a contract, and a recognizance, *i.e.*, a writing obligatory acknowledged before a judge or other officer having authority for that purpose and enrolled in a Court of Record, is strictly and properly a contract entered into with the Crown in its judicial capacity. The statutory forms of security known as statutes merchant, statutes staple, and recognizances in the nature of a statute staple, were likewise of record, but they have long since fallen out of use.*

[A contract under seal is a species of deed and the requisites for it are that it must be printed, typed or written on paper or parchment and signed, sealed and delivered. In practice signature was usual at Common Law, although there appears to have been no positive rule that it was necessary. The Law of Property Act 1925, (15 Geo. 5, c. 20) s. 73, makes essential the signature or mark of the person executing the deed. Sealing includes not only a seal in the common sense of that word, but also any sign or symbol which purports to be a seal and which has been recognized and adopted as his seal by the party executing the deed, it is frequently an adhesive wafer attached to the document even before its execution. Delivery has a somewhat technical meaning. It consists in the party who executes the deed placing his finger on the seal and saying, "I deliver this as my act and deed" without doing more, or merely handing the deed to the other party or his agent, without saying anything. If it is delivered to X to be delivered by him to the beneficiary upon some condition, it is called an "escrow" and does not become operative as a deed until the condition is fulfilled"]

1. At common law, the contracts of corporations. The rule that such contracts must in general be under seal is earlier than the time when the modern doctrine of contracts was

* As to Contracts of Record, see Anson, 55, 18th ed., and for an account of statutes merchant, &c., 2 Wms. Saund. 216--222.

** [The author nowhere describes the requisites mentioned above, and it seems advisable to include them.]

formed Of late years great encroachments have been made upon it, which have hardly reached their final limits, the law is still unsettled on some points, and demands careful consideration Both the historical and the practical reasons lead us to give this topic the first place

- 2 Partly by the law merchant (now codified in many jurisdictions) and partly by statute, the peculiar contracts expressed in negotiable instruments
- 3 By statute only—
 - A The various contracts within the Statute of Frauds, 1677 (29 Car. 2, c. 3), s. 4 Certain sales and dispositions of property are regulated by other statutes, but mostly as transfers of ownership or of rights good against third persons rather than as agreements between the parties
 - B Marine insurances
 - C Transfer of shares in companies (generally)
 - D Acknowledgment of debts barred by the Statute of Limitation of James I [repealed and replaced by the Limitation Act 1939 (2 & 3 Geo. 6 c. 21) *post* 507]
 - E Marriage This although we do not mean to enter on the subject of the Marriage Acts must be mentioned here to complete the list

CLAS TO CONTRACTS OF CORPORATIONS

The doctrine of the common law was that corporations could bind themselves only under their common seal except in small matters of daily occurrence, as the appointment of household servants and the like The principle of these exceptions being, in the words of the Court of Exchequer Chamber "convenience amounting almost to necessity" the vast increase in the extent, importance and variety of corporate dealings which has taken place in modern times has led to a corresponding increase of the exceptions Before considering these however it is well to cite an approved judicial statement of the rule, and of the reasons that may be given for it —

"The seal is required as authenticating the concurrence of the whole body corporate If the legislature in erecting a body corporate invest any member of it either expressly or impliedly, with authority to bind the whole body by his mere signature or otherwise, then undoubtedly the adding a seal would be matter purely of form, and not of substance Every one becoming a member of such a corporation, knows that he is liable to be bound in his corporate character, by such an act, and persons dealing with the corporation know that by such an act the body will be

¹⁰ 1 Wms Saund 615, 616, and see old authorities collected in notes to *Arnold v. Mayor of Poole* (1842) 4 M. & Gr 860, 12 L. J. C. P. 97, 61 R. R. 664, and *Fishmongers' Company v. Robertson* (1843) 5 M. & Gr 131, 12 L. J. C. P. 185, 63 R. R. 242

¹¹ *Church v. Imperial Gas Light Co.* (1838) 6 A. & E. 846, 861, 45 R. R. 638, 643

bound. But in other cases, the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting, however numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal, and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing: either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation."¹²

It is, no doubt, a matter of "inherent necessity" that when a natural person acts for a corporation, his authority must be shown in some way; and the common seal in the agent's custody, when an act in the law purports to be the act of the corporation itself, or his authority under seal, when it purports to be the act of an agent for the corporation, is in English law the recognized evidence for that purpose. But there is no reason in the nature of things why his authority should not be manifested in other ways: nor is the seal of itself conclusive, for an instrument to which it is in fact affixed without authority is not binding on the corporation. On the other hand, although it is usual and desirable for the deed of a corporation to be sealed with its proper corporate seal, it is laid down by high authorities that any seal will do.¹³ A company under the Companies Act must have its name engraved in legible characters on its seal, and any director, &c., using as the seal of the company any seal on which the name is not so engraved is subject to a penalty of 50*l.*:¹⁴ but this would not, it is conceived, prevent instruments so executed from binding the company.

We now turn to the exceptions. According to the modern authorities it is established that the "principle of convenience amounting almost to necessity" will cover all contracts which can fairly be treated as necessary and incidental to the purposes for which the corporation exists: and that in the case of a trading cor-

¹² *Mayor of Ludlow v. Charlton* (1840) 6 M. & W. 815, 823, 55 R. R. 794, adopted by Pollock, B. in *Mayor of Kidderminster v. Hardwick* 1873 L. R. 9 Ex. at 24; 43 L. J. Ex. 9; and see per Keating J. *Austin v. Guardians of Bethnal Green* (1874) L. R. 9 C. P. at 95; 43 L. J. C. P. 100. [Cf. p. 94, where it is pointed out that, on the authorities, it is impossible to say whether the requirements of a seal is a matter of form or a matter of substance; the citation from the *Ludlow* case in the text *supra* seems to recognize both principles.]

¹³ *Bank of Ireland v. Egan's Charity* (1855) 5 H. L. C. 389; 101 R. R. 218.

¹⁴ 10 Co. Rep. 30*b*; Shepp. Touchst. 57. Yet the rule is doubted, *Grant on Corp.* 59, but only on the ground of convenience and without any authority. The like rule as to sealing by an individual is quite clear and at least as old as Bracton: *Non multum refert utrum [carta] proprio vel alieno sigillo sit signata, cum semel a donatore coram testibus ad hoc vocatus recognita et concessa fuerit*, fo. 38*a*. Cp. Britton, 1. 257.

¹⁵ Consolidation Act, 1929, s. 93.

¹⁶ Notwithstanding the statutory penalty, there is a reported instance of the private seal of a director being used when the company had been so recently formed that there had been no time to make a proper seal: *Gray v. Lewis* (1869) L. R. 8 Eq. at 531. The like direction and penalty are contained in the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 66 (repeating an earlier enactment). The seal of a building society incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 16 (10), "shall in all cases bear the registered name thereof," but no penalty or other consequence is annexed to the non-observance of this direction.

poration all contracts made in the ordinary course of its business or for purposes connected therewith fall within this description. The same or even a wider conclusion was much earlier arrived at in the United States. As long ago as 1813 the law was thus stated by the Supreme Court :—

“It would seem to be a sound rule of law that wherever a corporation is acting within the scope of the legitimate purposes of its institution all parole contracts made by its authorized agents are express promises of the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action may well lie.”*

In England this rule cannot be so broadly laid down, as there is still a distinction between trading corporations and corporations created for any other purpose. As to the latter class there was formerly a serious conflict of decisions.

TRADING CORPORATIONS

As concerns trading corporations the law was settled by the unanimous decisions of the Court of Common Pleas and of the Exchequer Chamber in *South of Ireland Colliery Co. v. Waddle*.” The action was brought by the company against an engineer for non-delivery of pumping machinery, there being no contract under seal. Bovill C.J. said in the Court below that it was impossible to reconcile all the decisions on the subject: but the exceptions created by the recent cases were too firmly established to be questioned by the earlier decisions, which if inconsistent with them must be held not to be law:—

“These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents,—managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts,” they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain that argument.”

The decision was affirmed on appeal without hearing counsel for the plaintiffs, and Cockburn C.J. said the defendant was inviting the Court to reintroduce a relic of barbarous antiquity.”

* *Bank of Columbia v. Patterson* (1813) 7 Cranch, 299, 306. It is also held by the American authorities that the appointment by a corporation of an agent, officer, or attorney need not be under seal.

** (1868) L. R. 3 C. P. 463, in Ex. Ch. 4 C. P. 617; 38 L. J. C. P. 338. Most if not all of the previous authorities are there referred to.

*** This qualification is itself subject to the rule established by *Royal British Bank v. Turquand* (1856) 6 E. & B. 327; 25 L. J. Q. B. 317; 103 R. R. 472; and similar cases, and mentioned at p. 101. For details, see Note 4 in Appendix.

**** The following earlier cases may be considered as overruled:—*East London Waterworks v. Bailey* (1827) 4 Bing. 283. Action for non-delivery of iron pipes ordered for the company's works. The directors were authorized by the incorporating Act of Parliament to make contracts; but it was held that this only meant they might affix the seal without calling a meeting. See L. R. 3 C. P. 475. *Homersham v. Wolverhampton Waterworks Co.* (1851) 6 Ex. 137; 20 L. J. Ex. 193. Contract

As concerns non-trading corporations, the modern rule is "that, where work is done or services rendered at the request of the corporation in respect of matters for the doing of which it was created, and the benefit of the work or services is accepted by the corporation, so that a contract to pay would be implied in the case of a private person a similar implication should be made in the case of a corporation." So it has been laid down in the Court of Appeal, confirming earlier but not uncontradicted authority to the like effect. There still does not seem to be any authority for holding a

under seal for erection of machinery, price of extra work done with approval of the company's engineer and accepted but not within the terms of the sealed contract held not recoverable. *Diggle v London & Blackwall Ry Co* (1850) 5 Ex 442 19 L J Ex 308. Work done on railway in alterations of permanent way &c. *Finlay v Bristol & Exeter Ry Co* (1852) 7 Ex 409 21 L J Ex 117, 86 R R 704 where it was held that against a corporation tenancy could in no case be inferred from payment of rent so as to admit of an action for use and occupation without actual occupation. *London Dock Co v Sumoll* (1857) 8 E & B 347 27 L J Q B 129 112 R R 593 where a contract for scavenging the company's docks for a year was held to require the seal as not being of a mercantile nature nor with a customer of the company can now be of little or no authority beyond its own special circumstances. see per Bovill C J I R 3 C P 471.

The following cases were affirmed or not contradicted. Some of them were decided at the time on narrower or more particular grounds and in one or two the trading character of the corporation seems immaterial. *Beales v Lincoln Gas Co* 1837 6 A & F 829 45 R R 626. Action against the company for price of gas meters supplied. *Church v Imperial Gas Co* 1838 6 A & F 846 45 R R 638 in Ex Ch. Action by the company for breach of contract to accept gas. A supposed distinction between the liability of corporations on executed and on executory contracts was exploded. *Copper Mines of England v Fox* 1851 16 Q B 229 20 L J Q B 174 83 R R 439. Action in respect for non acceptance of iron rails ordered from the company. The company had in fact for many years given up copper mining and traded in iron but this was not within the scope of its incorporation. *Loxley v N H Ry Co* 1852 18 Q B 632 21 L J Q B 361 88 R R 726. The company was held liable in action for use and occupation when there had been an actual occupation for corporate purposes partly on the ground that a parcel contract for the occupation was within the statutory powers of the directors and might be presumed. (p. the next case) *Pauling v L & N W Ry Co* 1853 8 Ex 867 23 L J Ex 105 91 R R 807. Sleepers supplied to an order from the engineer's office and accepted. there was no doubt that the contract could under the Companies Clauses Consolidation Act 1845 8 & 9 Vict c 16 be made by the directors without seal and it was held that the acceptance and use were evidence of an actual contract. *Henderson v Australian Royal Mail Co* 1855 5 I & B 409 24 L J Q B 322 104 R R 538. Action on agreement to pay for bringing home one of the company's ships from Sydney. *Australian Royal Mail Co v Marshall* 1855 11 Ex 28 24 L J Ex 273. Action by the company on agreement to supply provisions for its passenger ship. *Reuter v Electric Telegraph Co* (1856) 6 F & B 341 26 L J Q B 46 106 R R 62, where the chief point was as to the ratification by the directors of a contract made originally with the chairman alone who certainly had no authority to make it. *Fabbu Vale Company v ca.* 1860 1 R 8 I c 14 decides that one who sells to a company goods of the kind used in its business need not ascertain that the company means to use them and is not prevented from enforcing the contract even if he had notice of an intention to use them otherwise.

¹¹ *Lauferd v Billerica Rural Council* [1903] 1 K B 772 786 per Mathew J. J. (p. Joyce J.) rather more guarded statement. *Douglas v Rhyl Urban Council* [1913] 2 Ch 407 115 82 L J Ch 537.

¹² *Sanders v St Acton Union* 1846 1 Q B 810 1 L J M C 104 70 R R 663. Iron gates for workhouse supplied to order without seal and accepted. *Paine v Strand Union* 1846 8 Q B 526 15 L J M C 89 70 R R 503. It really the same way though at first sight contra the decision being on the ground that making a plan for rating purposes of one parish within the union was not incidental to the purposes for which the guardians of the union were incorporated. they had nothing to do with either making or collecting rates in the several parishes nor had they power to act as a corporation in matters confined to any particular parish. *Clarke v Cuckfield Union* (1852) 21 L J Q B 349 91 R R 891 (in the Bail Court, by Wightman J.) Builders' work done in the workhouse. The former cases are

non-trading corporation liable on a parol agreement not yet executed by the promisee

With regard to municipal corporations (and it is presumed other corporations not created for definite public purposes) the ancient rule seems to be still in force to a great extent. An action will not lie for work done on local improvements,⁶³ or on an agreement for the purchase of tolls by auction,⁶⁴ or for the grant of a lease of corporate property,⁶⁵ without an agreement under seal. Where a municipal corporation owns a graving dock, a contract to let a ship have the use of it need not be under the corporate seal but this was said to fall within the ancient exception of convenience resting on the frequency or urgency of the transaction. The admission of a ship into the dock is a matter of frequent and ordinary occurrence and sometimes of urgency.⁶⁶

APPOINTMENTS TO OFFICES

There has also been little disposition to relax the rule in the case of appointments to offices and it seems at present that such an appointment if the office is of any importance must be under the corporate seal to give the holder a right of action for his salary or other remuneration. This appears by the following instances. —

Appointment of attorney. *Arnold v Mayor of Poole* (1842) 4 M & Gr 860 12 L J C P 97 61 R R 664. It is true that the Corporation of London appoints its attorney in Court without deed but that is because it is a matter of record see 4 M & Gr 882 896. But after an attorney has appeared and acted for a corporation the corporation cannot as against the other party to the action dispute his authority on this ground *Fairall v F C Ry Co* (1848) 2 Ex 344 17 L J Ex 223 297 76 R R 615. Nor can the other party dispute it after taking steps in the action. *Thomas Haden & Co v Hall* (1843) 5 M & Gr 274. Cp *Reg v Justices of Cumberland* 1848 17 L J Q B 102 5 Dowl & L 431 79 R R 859 n.

Grant of military pension by the East India Company in its political capacity. *Gibson v E I Co* (1859) 5 Bing N C 262 50 R R 688.

Increase of town clerk's salary in lieu of compensation. *Reg v Mayor of Stamford* (1844) 6 Q B 433 66 R R 449.

Office with profit annexed (coal meter paid by dues) though held at the reviewed. *Haigh v North Burley Union* 1838 1 B & F 873 28 L J Q B 62. An accountant employed to investigate the accounts of the union was held entitled to recover for his work as incidental and necessary to the purposes for which the corporation was created by Erie J. *Crompton J* doubting *Nicholson v Bradfield Union* (1866) 1 R 1 Q B 620 35 L J Q B 176. In direct opposition to the foregoing was *Lamprell v Billerica Union* 1840 3 L J Ex 283 18 L J Ex 282. Building contract, under seal providing for extra works on written directions of the architect. Extra work done and accepted but without such direction. Held, action would not lie. This appears to be now overruled. *Hunt v Wimbledon Local Board* (1878) 4 C P Div 48 48 L J C P 207. Whether the preparation of plans for new offices for an incorporated local board, which plans were not acted on, is work incidental and necessary to the purposes of the board. *quære*. The actual decision was on the ground that contracts above the value of 50l were imperatively required by statute to be under seal.

⁶³ *Mayor of Ludlow v Charlton* (1840) 6 M & W 815 55 R R 794.

⁶⁴ *Mayor of Kidderminster v Hardwick* (1873) L R 9 Ex 13, 43 L J Ex 9.

⁶⁵ *Mayor of Oxford v Rou* [1893] 3 Ch 535 where the corporation sought to enforce the agreement.

⁶⁶ *Wells v Kingston-upon-Hull* (1875) L R 10 C P 402 44 L J C P 257.

pleasure of the corporation: *Smith v. Cartwright* (1851) 6 Ex. 927; 20 L. J. Ex. 401. (The action was not against the corporation, but against the person by whom the dues were alleged to be payable. The claim was also wrong on another ground.)

Collector of poor rates *Smart v. West Ham Union* (1855) 10 Ex. 867, 24 L. J. Ex. 201 but partly on the ground that the guardians had not undertaken to pay at all, the salary being charged on the rates, and wholly on that ground in Ex Ch 11 Ex 867, 25 L. J. Ex 210, 105 R. R. 831

Clerk to master of workhouse *Austin v. Guardians of Bethnal Green* 1874 L. R. 9 C. P. 91 43 L. J. C. P. 100

Dunston v. Imperial Gas Light Co. (1832, 3 B. & Ad. 125 37 R. R. 352, as to directors' fees voted by a meeting, but chiefly on the ground that the fees were never intended to be more than a gratuity

Cope v. Thomas Haden & Co. (1849) 3 Ex. 841 18 L. J. Ex. 345 77 R. R. 859 agent appointed for a special negotiation with another company not allowed to recover for his work the contract not being under seal nor in the statutory form 212 signed by three directors in pursuance of a resolution although by another section of the special Act the directors had full power to 'appoint and displace' all such managers officers agents 'as they shall think proper'. It seems difficult to support the decision this was not like an appointment to a continuing office and cf *Reg. v. Justices of Cumberland* (1848) 17 L. J. Q. B. 102 5 Dowl. & L. 431 79 R. R. 859 n., where under very similar enabling words an appointment of an attorney by director, without seal was held good as against third parties."

It has been decided (as indeed it is obvious in principle) that inability to enforce an agreement with a corporation at law by reason of its not being under the corporate seal does not create any jurisdiction to enforce it in equity."

The rights of corporations to sue upon contracts are somewhat more extensive than their liabilities. When the corporation has performed its own part of the contract so that the other party has had the benefit of it the corporation may sue on the contract though not originally bound. For this reason if possession is given under a demise from a corporation which is invalid for want of the corporate seal, and rent paid and accepted, this will constitute a good yearly tenancy⁶⁹ and will enable the corporation to enforce any term of the agreement which is applicable to such a tenancy,⁷¹ and a tenant who has occupied and enjoyed corporate lands without any deed may be sued for use and occupation.⁷²

⁶⁹ [For other cases, see Halsbury's Laws of England (2nd ed., vol. 8, § 164.)

⁷⁰ *Kirk v. Bromley Union* (1845) 2 Ph. 640, 78 R. R. 232. *Crampton v. Varna Ry. Co.* (1872) L. R. 7 Ch. 562, 41 L. J. Ch. 817.

⁷¹ *Fushongers' Co. v. Robertson* (1843) 5 M. & Gr. 131, 12 L. J. C. P. 185. The judgment on this point is at pp. 192-6; but the dictum contained in the passage "Even if . . . against themselves," pp. 192-3 (extending the right to sue without limit) is now overruled. See *Mayor of Kidderminster v. Hardunch* (1873) L. R. 9 Ex. 13, 21; 43 L. J. Ex. 9.

⁷² *Wood v. Tate* (1806) 2 Bos. & P. N. R. 247, 9 R. R. 645.

⁷³ *Eccles, Commrs. v. Marral* (1869) L. R. 4 Ex. 162; 38 L. J. Ex. 93. By Kelly C.B. this is correlative to the tenant's right to enforce the agreement in equity on the ground of part performance, *sed quæ*.

⁷⁴ *Mayor of Stafford v. Till* (1827) 4 Bing. 75, 29 R. R. 511. The like as to tolls. *Mayor of Carmarthen v. Lewis* (1834) 6 C. & P. 608, but see Serj. Manning's note

Conversely the presumption of a demise from year to year from payment and acceptance of rent is the same against a corporation as against an individual landlord. "where the corporation have acted as upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made." And a person by whose permission a corporation has occupied land may sue the corporation for use and occupation. In the case of a yearly tenancy the presumption is of an actual contract but the liability for use and occupation is rather *quasi ex contractu*. It is settled that in general a cause of action on quasi contract is as good against a corporation as against a natural person. Thus a corporation may be sued in an action for money received on the ground of strict necessity. It cannot be expected that a corporation should put their seal to a promise to return moneys which they are wrongfully receiving. It was held much earlier that trover could be maintained against a corporation—a decision which is pointed out in the case last cited, was analogous in principle though not in form. Sometimes it is stated as a general rule that corporations are liable on informal contracts of which they have in fact had the benefit but the extent and existence of the supposed rule are doubtful.

SPECIAL STATUTORY FORMS

Forms of contracting otherwise than under seal are provided by many special or general Acts of Parliament creating or regulating corporate companies and contracts duly made in those forms are of course valid. But a statute may on the other hand contain restrictive provisions as to the form of corporate contracts, and in that case they must be strictly followed. Enactments requiring contracts of local corporate authorities exceeding a certain value to be in writing and sealed with the corporate seal are held to be imperative, even if the agreement has been executed and the cor

⁷² *Doe d Pennington v Taniere* (1848) 12 Q. B. D. 998, 1013, 19 L. J. Q. B. 49, 76 R. R. 450.

⁷⁴ *Lowe v L & N W Ry Co* (1852) 18 Q. B. 632, 21 L. J. Q. B. 361, 88 R. R. 726.

⁷⁵ The liability existed at common law; the remedy was improved by the Distress for Rent Act, 1737 (11 Geo. 2, c. 19) s. 14. See *Gibson v Kirk* (1841) 1 Q. B. 850, 10 L. J. Q. B. 297. Obsolete under modern procedure.

⁷⁶ *Hall v Mayor of Swansea* (1844) 5 Q. B. 526, 549, 13 L. J. Q. B. 107, 64 R. R. 564. The like of a quasi corporation empowered to sue and be sued by an officer. *Jeffery v Gurr* (1831) 2 B. & Ad. 833, 36 R. R. 769.

⁷⁷ *Tarborough v Bank of England* (1812) 16 East, 6, 14 R. R. 272. See early cases of trespass against corporations cited by Lord Ellenborough, 16 East, at 10, 14 R. R. 275, 276.

⁷⁸ *Hunt v Wimbeldon Local Board* (1878) 4 C. P. Div. at 53, 57, 48 L. J. C. P. 207. [Assuming the rule to exist it seems to be subject to the proviso that the other party who has executed his side of the contract can recover only if the contract was essential to the purposes of the corporation. Salmond & Winfield, Contracts, 489—490.]

poration has had the full benefit of it'. The general result seems to stand thus —

In the absence of enabling or restrictive statutory provisions, which will now be found to exist in the case of almost every corporation engaged in commercial affairs

A trading corporation may make without seal any contract incidental to the ordinary conduct of its business, but it cannot bind itself by negotiable instruments unless the making of such instruments is a substantive part of that business, or is provided for by its constitution."

A non trading corporation so far as it is incorporated for special purposes may make without seal any contract incidental to those purposes, but if it has no such purposes or not any now practically subsisting, it apparently cannot contract without seal except in cases of immediate necessity, constant recurrence, or trifling importance

In any case where an agreement has been completely executed on the part of a corporation it becomes a contract on which the corporation may sue

The rights and obligations arising from the tenancy or occupation of land without an express contract apply to corporations both as landlords and as tenants or occupiers in the same manner' and to the same extent as to natural persons

A corporation is bound by an obligation implied in law when ever under the like circumstances a natural person would be so bound

2. NEGOTIABLE INSTRUMENTS

The peculiar contracts undertaken by the persons who issue or endorse negotiable instruments must by the nature of the case be in writing. Part of the definition of a bill of exchange is that it is

* *Frend v. Dennett* 1858 3 C. B. N. S. 576, 27 L. J. C. P. 314. *Hunt v. Wimbeldon Local Board* 1878 3 C. P. D. 38 in C. A. 4 C. P. Div. 48. 48 L. J. C. P. 207. *Town & Co. v. Mayor of Lenington* 1883 8 App. Ca. 517, 52 L. J. Q. B. 713. *Hoare v. Kingsbury Urban Council* [1912] 2 Ch. 452, 81 L. J. Ch. 666. Moreover a contract without any such enactment cannot be rectified for the Court can take no notice of any previous agreement. *W. Higgins Ltd. v. Northampton Corporation* [1927] 1 Ch. 128, 96 L. J. Ch. 38. In *Faton v. Basker* 1881 17 Q. B. Div. 529, 50 L. J. Q. B. 444 it was decided that a provision of this kind in the Public Health Act 1875 38 & 39 Vict. c. 55, s. 174 applies only to contracts known at the time of making them to exceed the specified value or amount of 50l. As to the application of the provisions of that Act to bodies outside by an extremely elliptical and somewhat ungrammatical statutory reference *Nixon v. Erith Urban D. C.* [1924] 1 K. B. 819, 93 L. J. K. B. 756 C. A. [Note that s. 174 was repealed by the Local Government Act 1933, 23 & 24 Geo. 5, c. 51, s. 266 of which contains rules for the making of contracts by local authorities and includes no reference to any 50l. limit but as contracts must under s. 266 be made in accordance with the standing orders of the local authority, it is possible for any such authority to require writing for contracts which exceed in value and amount the particular sum if any, specified by the standing orders, see *Lumley's Public Health* (11th ed.) vol. I, 1131.]

** See pp. 106, 108.

*** Assuming *Finlay v. Bristol & Exeter Ry. Co.* 1852 7 Ex. 409, 21 L. J. Ex. 117, 86 R. R. 704 not to be now law.

an unconditional order in writing " The acceptance of a bill of exchange, though it may be verbal as far as the law merchant is concerned, is required by statute to be in writing and signed "

3 AS TO PURELY STATUTORY FORMS

A *Contracts within the Statute of Frauds, 1677* (29 Car 2, c 3), ss 4, 17 "

We shall here state, so far as contracts are concerned, the contents of the statute, and some of the leading points established on the construction of it

Sect 4—The statute enacts that no action shall be brought on any of the contracts specified in the 1st section ' unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized ' The contracts comprised in this section are

a Any special promise ' by an executor or administrator ' to answer damages out of his own estate ' No difficulty has arisen on the words of the statute and the chief observation to be made is the almost self-evident one (which equally applies to the other cases within the statute) that the existence of a written and signed memorandum is made a necessary condition of the agreement being enforceable but will in no case make an agreement any better than it would have been apart from the statute A good consideration a real consent of the parties to the same thing in the same sense and all other things necessary to make a contract good at common law are still required as much as before "

b Any special promise to answer for the debt default or miscarriages of another person "

On this the principal points are as follows A promise is not within the statute unless there is a debt &c of some other person for which that other is to remain liable (though the liability need not be a present one) for there can be no contract of suretyship or guaranty unless and until there is an actual principal debtor 'Take away the foundation of principal contract the contract of suretyship would fail ' Where the liability present or future

⁷² Bills of Exchange Act 1882 § 4 & 3^d Act (61) s 3 'So of promissory notes' s 83

⁷³ *Ib* s 17 'It will be remembered that bills at sight (of which cheques are a species) do not need acceptance'

⁷⁴ As to its authorship see Prof Crawford D Henning in *Univ. of Pennsylv. Law Rev.* March 1913 [For a historical account of the statute see Holdsworth *History of English Law* vi 379-396 and for a monograph on the current law Dr James Williams *The Statute of Frauds* § 4 1912 see too 30 L Q R 532-539]

⁷⁵ 'Special promise' meant for the lawyers of the Restoration special as opposed to *indebitatus assumpsit* See Prof Crawford D Henning in 57 *Univ. Pa. Law Rev.* 611

⁷⁶ As to these contracts of executors Williams *Executors* (12th ed 1930) 1161-1171

^{77a} [For a comparative study see Dr F J Cohn in 54 L Q R 220-232]

⁷⁷ *Mountstephen v Lakeman* (1871) 1 R 7 Q B 196 202 (in Ex Ch), 43 L J Q B 188 per Willes J affd (1874) 1 R 7 H L 17 nom *Lakeman v Mountstephen*

of a third person is assumed as the foundation of a contract, but does not in fact exist, then, independently of the statute, and on the principle of a class of cases to be explained elsewhere, there is no contract. On the other hand a promise to be primarily liable, or to be liable at all events, whether any third person is or shall become liable or not, is not within the statute and need not be in writing. It may be an indemnity, it is not a guaranty." But if the promise is substantially dependent on a third person's default it is within the statute." Whether particular spoken words, not in themselves conclusive, e.g., "Go on and do the work and I will see you paid," amount to such a promise or only to a guaranty is a question of fact to be determined by the circumstances of the case."

Not is a promise within the statute unless it is made to the principal creditor. The statute applies only to promises made to the person to whom another is answerable "" or is to become so.

A mere promise of indemnity is not within the statute," though any promise which is in substance within it cannot be taken out of it by being put in the form of an indemnity." A promise to bear contingent losses, incidental to a transaction in which the promisor has an independent interest, is a promise of indemnity and not a guaranty." But a guaranty is not taken out of the statute merely because the guarantor has some interest in the principal debtor's solvency."

A contract to give a guaranty at a future time is as much within the statute as the guaranty itself."

c "Any agreement made upon consideration of marriage." A promise to marry is not within these words, the consideration being not marriage, but the other party's reciprocal promise to marry. For further remarks on the effect of this clause see Chapter XIII on Agreements of Imperfect Obligation.

In old books we frequently meet with another sort of difficulty touching agreements of this kind; it was much doubted whether matrimony were not so purely spiritual a matter that all agreements concerning it must be dealt with only by the ecclesiastical

¹⁰⁰ *Guild & Co. v. Conrad* [1894] 1 Q. B. 885, 63 L. J. Q. B. 721.

¹⁰¹ *Harburg India Rubber Comb Co. v. Martin* [1902] 1 K. B. 778; 71 L. J. K. B. 529; *Davys v. Buswell* [1913] 2 K. B. 47; 82 L. J. Ch. 499, both in C. A.

¹⁰² *Lakeman v. Mountstephen*, *Guild & Co. v. Conrad*.

¹⁰³ *Eastwood v. Kenyon* (1840) 11 A. & E. 438, 446, 52 R. R. 400; *concess. Cripps v. Hartnoll* (1863) 4 B. & S. 414; 32 L. J. Q. B. 381 (Ex. Ch.).

¹⁰⁴ *Cripps v. Hartnoll* (last note); *Wildes v. Dudlow* (1874) L. R. 19 Eq. 198; 44 L. J. Ch. 341. So of an indemnity by one partner to his co-partners in respect of a doubtful debt from a third person to the firm: *Re Hoyle* [1893] 1 Ch. 84; 62 L. J. Ch. 182, C. A.

¹⁰⁵ *Cripps v. Hartnoll*, note ¹⁰¹.

¹⁰⁶ *Stutton v. Grey* [1894] 1 Q. B. 285; 63 L. J. Q. B. 633.

¹⁰⁷ *Davys v. Buswell*, note ¹⁰⁰.

¹⁰⁸ *Mallet v. Bateman* (1865) L. R. 1 C. P. 163 (Ex. Ch.); 35 L. J. C. P. 40. See further on this clause, 1 Wms. Saund. 229-235, or 1 Sm. L. C. 334, note to *Birkmyr v. Darnell* (1705). Cp. *Wallace v. Gibson* [1895] A. C. 354, on the Mercantile Law (Scotland) Amendment Act.

courts: the type of these disputed contracts is a promise by A. to B. to pay B 10l if he will marry A's daughter. But this by the way."

d "Any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." This clause is usually and conveniently considered as belonging to the topic of Vendors and Purchasers of real estate, and the reader is referred to the well-known works which treat of that subject." Questions have arisen however whether sales of growing crops and the like were sales of an interest in lands within the 11th section or of goods within the 17th." A sale of tenant's fixtures, being a sale only of the right to sever the fixtures from the freehold during the term, is not within either section.

Now all conveyances of land must be by deed. Law of Property Act, 1925 (15 Geo 5 c 20) s 52 superseding the earlier provisions both of the Statute of Frauds and of the Real Property Act 1845 (8 & 9 Vict c 106). But an informal lease, though void as a lease, may be good as an agreement for a lease."

e "Any agreement that is not to be performed within the space of one year from the making thereof"

Is not to be, not is not, or may not be. This means an agreement that on the face of it is not to be performed within a year and includes an agreement purporting to extend over a

- * Such promise may be sued on in the King's Court if by deed. 22 Lib Ass 101, pl 70, otherwise if he had promised 10l with his daughter in marriage, then it should be in the Court Christian. Trin 35 Ed III 24 pl 30. action good without speciality where the marriage had taken place. Mich 3-11 VI 8 pl 18 contra (not without dissent) Trin 17 Ed IV 4, pl 3. In Bracton's time the exclusive jurisdiction of the spiritual courts appears to have been admitted. ad forum seculare trahi non debet per id quod minus est et non principale id quod primum et principale est in foro ecclesiastico ut si ob causam matrimonii pecunia promittatur, licet videatur prima facie cognitio super catallis et debitis pertinere ad forum seculare tamen propter id quod maius est et dignius trahitur cognitio pecunie promissae et libitae ad forum ecclesiasticum, et ubi [?] ibi] locum non habet prohibitio cum debitum sit de testamento vel matrimonio. folio 175 a. It should be remembered that throughout the Middle Ages ordinary debts were indirectly enforced in the spiritual courts by the imposition of penance. e.g., 22 Lib Ass ubi sup. The so-called statute of *Circumspecte agatis* appears to have been construed as allowing this if the spiritual court did not directly order payment of the debt.
- ** [E.g. Williams Vendors and Purchasers] This provision is now replaced by a more clearly worded enactment. Law of Property Act 1925, s 40. As to an agreement collateral to a demise of land not being within the statute, see *Morgan v Griffith* (1871) L R 6 Ex 70, 40 L J Ex 46, *Friskine v Adeane* (1873) L R 8 Ch 756, 42 L J Ch 835, *Angell v Duke* (1875) L R 13 Q B 174, 44 L J Q B 78. *De Lussalle v Guildford* [1901] 2 K B 215, 70 L J K B 533 C A. A promise by A to B that if B buys Whiteacre A will repay B the price is not within s 4. *Boston v Boston* [1904] 1 K B 124, 73 L J K B 17, C A. As to a more than doubtful extension of this class of authorities in Ontario *Mercier v Campbell* (1907) 14 O L R 599, see L Q R xxvi, 194. As to the distinction between a demise and a mere licence or agreement for the use of land without any change of possession, *Wells v Kingston-upon-Hull* (1875) L R 10 C P 402, 44 L J C P 257.
- ** *Marshall v Green* (1875) 1 C P D 35, 45 L J C P 153. As to building materials to be severed from the soil, *Lavery v Pursell* (1888) 39 Ch D 508, 57 L J Ch 570.
- ¹ *Lee v Gaskell* (1877) 1 Q B D 700, 45 L J Q B 540.
- ² *Dart, V & P* 1, 198. [If the author's reference is to Dart's 8th ed (1920), it does not support the text, a reference which does is Woodfall, Landlord and Tenant (24th ed 1939), 192-194.]

longer term, notwithstanding that it may be determinable by an option or other given contingent event within a year.' An agreement capable of being performed within a year, and not showing any intention to put off the performance till after a year, is not within this clause.¹ Nor is an agreement within it which is completely performed by one party within the year;² nor an agreement not expressed to be for any certain term, and determinable on a contingency which may happen within a year.³ An agreement for service for one year 'from' the day next following is not within the statute.⁴ A party to a parol agreement within the statute who has fully performed his part is not thereby entitled to sue on the agreement, but can recover as on an implied contract for services rendered.⁵

Sect. 17.—This section of the statute⁶ was extended by the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14; Lord Tenterden's Act) s. 7, so as to include all executory sales of goods of the value of 10*l.* and upwards, whether the goods be in existence or not at the time of the contract. In England these enactments are superseded and consolidated by the Sale of Goods Act, 1893⁷

"NOTE OR MEMORANDUM"

There is a curious difference in the judicial interpretation of the "agreement" of which a memorandum or note is required by s. 4, and the "bargain" of which a note or memorandum was required by s. 17. The "agreement" of s. 4 includes the consideration of the contract, so that a writing which omits to mention the consideration does not satisfy the words of that section: but the "bargain" of s. 17 includes the price of the goods as a material term only where it has been specifically agreed upon.⁸ So far as regards guaranties, however, this construction

¹ *Hanau v. Ehrlich* [1912] A. C. 30, 81 L. J. K. B. 397, approving *Dobson v. Collins* (1856) 1 H. & N. 81, 25 L. J. Ex. 267, 108 R. R. 466.

² *Smith v. Neale* (1857) 2 C. B. N. S. 67; 26 L. J. C. P. 143, 109 R. R. 611. But see *Reece v. Jennings* [1910] 2 K. B. 522.

³ *Cherry v. Heming* (1839) 4 Ex. 631, 19 L. J. Ex. 63, 80 R. R. 744. See notes to *Peter v. Compton*, 1 Sm. L. C. 316.

⁴ *McGregor v. McGregor* (1888) 21 Q. B. Div. 424; 57 L. J. Q. B. 591, apparently not overruled by *Hanau v. Ehrlich*. [See, too, *Adams v. Union Cinemas, Ltd.* [1939] 3 All E. R. 136, 138, which du Parcq L. J. regarded as one more illustration of the grotesque results of the statute. Cf. 50 L. J. Q. R. 82, 85.]

⁷ *Smith v. Gold Coast and Ashanti Explorers* [1903] 1 K. B. 285, in C. A. 16 838; for the last day of the service will be the anniversary of the day on which the contract is made.

⁸ *Scott v. Pattison* [1923] 2 K. B. 723; 92 L. J. K. B. 886.

⁹ Sixteenth in the Revised Statutes; the difference arises from the preamble and the enacting part of s. 13 being separately numbered as 13 and 14 in other editions. The section is commented on in detail in *Blackburn on Sale*, *Benjamin on Sale*, and *Sir M. Chalmers on the Sale of Goods Act, 1893* (11th ed. 1931). A modern case of some importance on acceptance is *Taylor v. Smith*, C. A. [1893] 2 Q. B. 69; 61 L. J. Q. B. 331. If a contract for sale within s. 17 is also within s. 4, acceptance and receipt without writing will not make it actionable: *Prested Miners Co. v. Garner* [1910] 2 K. B. 776.

¹⁰ 56 & 57 Vict. c. 71, s. 4.

¹¹ *Headly v. McLaine* (1834) 10 Bing. 482, 38 R. R. 510.

of s. 4 having been found inconvenient is excluded by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3, which makes it no longer necessary that the consideration for a "special promise to answer for the debt default or miscarriage of another person" should appear in writing or by necessary inference from a written document.¹²

The note or memorandum under either section must show what is the contract and who are the contracting parties,¹³ but it need be signed only by the party to be charged, and indeed it need not be signed in the common meaning of the word, for the party's name inserted by his authority in the body or at the head of the memorandum may suffice.¹⁴ It is no answer to an action on a contract evidenced by the defendant's signature to say that the plaintiff has not signed and therefore could not be sued, and if a written and duly signed proposal is accepted by word of mouth the contract itself is completed by such acceptance and the writing is a sufficient memorandum of it.¹⁵ It has also been decided that an acknowledgment of a signature previously made by way of proposal, the document having been altered in the meantime and the party having assented to the alterations, is equivalent to an actual signature of the document as finally settled and as the record of the concluded contract. The signature contemplated by the statute is not the mere act of writing, but the writing coupled with the party's assent to it as a signature to the contract: and the effect of the parol evidence in such a case is not to alter an agreement made between the parties but to show what the condition of the document was when it became an agreement

¹² See also an article by the late Sir James Stephen and the present writer in the Law Quarterly Review 111, and the notes to *Burkmyr v. Darnell* (1705) and *Wain v. Wallers* (1804) 7 R. R. 645, in 2 Sm. L. C.

¹³ *Williams v. Byrne* (1863) 1 Moo. P. C. N. S. 154; *Newell v. Radford* (1867) L. R. 3 C. P. 52; 37 L. J. C. P. 1; *Koenigsblatt v. Sweet* [1923] 2 Ch. 314; 92 L. J. Ch. 598 (agent's amendments at date of signature afterwards ratified); *Williams v. Jordan* (1877) 6 Ch. D. 517; 46 L. J. Ch. 681; *Deuon v. Munroft* [1912] 2 K. B. 373; and as to sufficiency of description otherwise than by name, *Rossiter v. Miller* (1878) 3 App. Ca. 1124; 48 L. J. Ch. 10; *Catling v. King* (1877) 5 Ch. Div. 660; 46 L. J. Ch. 384; *Jarrett v. Hunter* (1886) 34 Ch. D. 182; *Coombs v. Wilkes* (1891) 3 Ch. 77; 61 L. J. Ch. 42; *Fulby v. Hounsell* (1896) 2 Ch. 737; 65 L. J. Ch. 852 (name of agent for undisclosed vendor sufficient); *Carr v. Lynch* [1900] 1 Ch. 613; 69 L. J. Ch. 345 (reference to payment made by purchaser without name); *Fay v. Miller & Co* [1941] Ch. 360; cf. 57 L. Q. R. 451]. As to what is sufficient description of the property sold under s. 4, *Shardlow v. Cotterell* (1881) 20 Ch. Div. 90; 51 L. J. Ch. 353; *Plant v. Bourne* [1897] 2 Ch. 281; 66 L. J. Ch. 620; C. A. v. *Dunbach v. Nelson* [1919] 2 Ch. 383; 88 L. J. Ch. 493.

Evans v. Hoare [1892] 1 Q. B. 593; 61 L. J. Q. B. 470. As to the authority of an auctioneer to sign as agent for a purchaser, and its duration, see *Bell v. Balls* [1897] 1 Ch. 669; 66 L. J. Ch. 397; *Cohen v. Roche* [1927] 1 K. B. 169; 95 L. J. K. B. 945; Law of Property Act, 1925, s. 40; *Chaney v. Macleod* [1929] 1 Ch. 461; 98 L. J. Ch. 345; C. A.; [Phillips v. Butler [1945] 2 All E. R. 258.] As to counsel's authority, *Farr, Smith & Co. v. Messers* [1928] 1 K. B. 397; 97 L. J. K. B. 126.

¹⁴ *Smith v. Neale* (1857) 2 C. B. N. S. 67; 26 L. J. C. P. 143; 109 R. R. 611; *Rauss v. Picklesley* (1866) in Ex. Ch. L. R. 1 Ex. 342; 35 L. J. Ex. 218; 143 R. R. 797. And where alternative offers are made by a signed writing, parol acceptance of one alternative has been held sufficient: *Lever v. Koffler* [1901] 1 Ch. 543; 70 L. J. Ch. 395; *Morrell v. Studd and Millington* [1913] 2 Ch. 648; 83 L. J. 114, is a peculiar case: cf. L. Q. R. xxx, 4, 151.

between them.¹⁴ Moreover it matters not for what purpose the signature is added, since it is required only as evidence, not as belonging to the substance of the contract. It is enough that the signature attests the document as that which contains the terms of the contract.¹⁵ Nor need the particulars required to make the complete memorandum be all contained in one document: the signed document may incorporate others by reference, but the reference must appear from the writing itself and not have to be made out by oral evidence: for in that case there would be no record of a contract in writing, but only disjointed parts of a record pieced out with unwritten evidence.¹⁶ Even a party not named in the principal document may be identified by reference to a writing shown to be part of the same transaction.¹⁷ The reference, however, need not be in express terms. It is enough if it appears on the documents that they are parts of the same agreement.¹⁸ One who is the agent of one party only in the transaction may be also the agent of the other party for the purpose of signature.¹⁹ The memorandum must exist at the time of action brought.²⁰ It must be remembered that at the date of the statute and long after (in fact till 1851) parties to an action could not be witnesses. This goes some way to explain the motives of the framers.

It seems that the Statute of Frauds does not apply to deeds. Signature [until the Law of Property Act, 1925 (p. 6), was] unnecessary for the validity of a deed and it is not likely that the Legislature meant to require signature where the higher solemnity of sealing (as it is in a legal point of view) is already present.²¹

SALE OF HORSES

There is "An Act to avoid Horse-stealing," 1589 (31 Eliz. c. 12) which prescribes sundry forms and conditions to be observed on sales of horses

¹⁴ *Stewart v. Eddowes* (1874) 1 L. R. 9 C. P. 311; 43 L. J. C. P. 204; *Horne v. Walker* [1923] 2 Ch. 218; 92 L. J. Ch. 573, adds very little to this.

¹⁵ *Jones v. Victoria Graving Dock Co.* (1877) 2 Q. B. Div. 314, 323; 46 L. J. Q. B. 219. Accordingly it does not matter, in the case of an agent signing, whether he was or was not authorized to conclude a contract. *Damels v. Trefusis* [1914] 1 Ch. 788; 83 L. J. Ch. 579; *North v. Loomes* [1919] 1 Ch. 378; 88 L. J. Ch. 217; *Grindell v. Bass* [1920] 2 Ch. 487; 89 L. J. Ch. 591.

¹⁶ See *Pease v. Corf* (1874) 1 L. R. 9 Q. B. 210; 43 L. J. Q. B. 52; *Kronheim v. Johnson* (1877) 7 Ch. D. 60; 47 L. J. Ch. 132; *Leather Cloth Co. v. Hieronimus* (1875) 1 L. R. 10 Q. B. 140; 44 L. J. Q. B. 54; *Boydell v. Drummond* (1806) 11 East. 142; *Taylor v. Smith* [1893] 2 Q. B. 65; 61 L. J. Q. B. 331.

¹⁷ *Stokes v. Whicher* [1920] 1 Ch. 411; 89 L. J. Ch. 198 (common form containing the words "I agree to purchase" signed by vendor's agent only).

¹⁸ *Studds v. Watson* (1884) 28 Ch. D. 305; *Wylson v. Dunn* (1887) 34 Ch. D. 569; *Oliver v. Hunting* (1890) 44 Ch. D. 205; 59 L. J. Ch. 255, where the judgment states that the old rule was different; *Pease v. Gardner* [1897] 1 Q. B. 688; 66 L. J. Q. B. 457. C. A. (envelope and letter proved to have been enclosed in it may be taken as one document to identify addressee).

¹⁹ As to this, *Murphy v. Boese* (1875) L. R. 10 Ex. 126; 44 L. J. Ex. 40.

²⁰ *Lucas v. Dixon* (1880) 22 Q. B. Div. 357; 58 L. J. Q. B. 161 (defendant's affidavit on interlocutory proceedings in the action will not do).

²¹ *Cherry v. Heming* (1849) 4 Ex. 631; 19 L. J. Ex. 63; 80 R. R. 733. Blackstone (ii, 306) and see note in Stephen's Comm., 1, 510, 6th ed., assumed signature to be necessary. [For the Law Revision Committee's recommendations as to the Statute of Frauds, see its Sixth Interim Report, 1937, Cmd. 5449.]

at fairs and markets: and provides that "every sale gift exchange or other putting away of any horse mare gelding colt or filly, in fair or market not used in all points according to the true meaning aforesaid shall be void,"²⁴ and an earlier Act on the same subject (1555; 2 & 3 Phil. & Mary, c. 7), which only deprives the buyer of the benefit of the rule of the common law touching sales in market overt. These Acts are not touched by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 22.²⁵

In a general treatise of the present kind it would be of no practical use to consider the forms imposed on the transfer of various kinds of property (so far as contracts for such transfer are affected) by the provisions of special statutes. The most important of such statutes are the Bills of Sale Acts, 1878 (41 & 42 Vict. c. 31) and 1882 (45 & 46 Vict. c. 43) and the Merchant Shipping Act, 1894 (56 & 57 Vict. c. 60). Transfers of shares in companies are, with few exceptions if any, subject to requirements of form, but executory agreements therefor need not as a rule be in writing.

B. *Marine Insurances*

By the Marine Insurance Act, 1906 (6 Ed. 7, c. 41), "a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act;" it must specify prescribed particulars and be signed by or on behalf of the insurer;²⁶ by the Stamp Act, 1891, which the Marine Insurance Act does not affect,²⁷ a contract for sea insurance (with a limited exception) is not valid unless expressed in a policy.

C. *Acknowledgment of barred debts*

The operation of the Statute of Limitation (21 Jac. 1, c. 16) in taking away the remedy for a debt may be excluded by a subsequent promise to pay it, or an acknowledgment from which such promise can be implied. [The Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 21, requires every acknowledgment to be in writing signed by the person making the acknowledgment; it also enables acknowledgment to be made by an agent. The Act replaced on these points the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 1, and the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 13.]²⁸ We say more of this under the head of Agreements of Imperfect Obligation, Chap. XIII.

²⁴ *Moran v. Pitt* 1873 42 L. J. Q. B. 47.

²⁵ See Oliphant on the Law of Horses, 6th ed. 54-66. The text of the Acts is reprinted in Appendix I to Chalmers on the Sale of Goods Act, [omitted in the current edition (11th, 1931)].

²⁶ ss. 22-24.

²⁷ 54 & 55 Vict. c. 39, s. 93, superseding the Customs and Inland Revenue Act, 1867 (30 Vict. c. 23), s. 7, which itself superseded earlier enactments; M. I. A. s. 91. [Later enactments modifying 54 & 55 Vict. c. 39, s. 93, are the Cunard (Insurance) Agreement Act, 1930, (21 & 22 Geo. 5, c. 2), s. 3 (amended by North Atlantic Shipping Act, 1934 (24 Geo. 5, c. 10), s. 3), and the War Risks Insurance Act, 1939 (2 & 3 Geo. 6, c. 57), s. 18.] As to the recognition of the "slip" for collateral purposes, see Ch. XIII.

[See Preston & Newsom, Limitation of Actions (2nd ed., ch. viii).]

CONSIDERATION

THE following description of Consideration was given by the Exchequer Chamber in 1875: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance detriment, loss, or responsibility, given, suffered, or undertaken by the other."¹

The second branch of this judicial description is really the more important one. Consideration means not so much that one party is profited as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first. It does not matter whether the party accepting the consideration has any apparent benefit thereby or not: it is enough that he accepts it, and that the party giving it does thereby undertake some burden, or lose something which in contemplation of law may be of value.

An act or forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

A consideration, properly speaking, can be given only for a promise. Where performance on both sides is simultaneous, there may be agreement in the wider sense, but there is no obligation and no contract. It may be amusing and not un instructive to consider the distinctions to be observed in the legal analysis of such common dealings as being ferried across a river and paying on the other side, buying a newspaper on a railway platform, obtaining a box of matches from an automatic machine. The reader may multiply examples at his pleasure.

A consideration which is itself a promise is said to be *executory*.

¹ *Currie v. Misa* (1875) 1 L. R. 10 Ex. at 162; 44 L. J. Ex. 94; per Cur. referring to Com. Dig. Action on the Case, Assumpsit B. 1-15. Cp. Evans, Appendix to Pothier on Obligations, No. 2; and *Edgware Highway Board v. Harrow Gas Co.* (1874) L. R. 10 Q. B. 92, 95; 44 L. J. Q. B. 1; and for the historical distinction between debt and assumpsit in this respect, Langdell, Summary, §§ 64, 65. [For American law, see Williston, Contracts, §§ 102-103 G, where the learned author insists on the necessity for distinguishing between bilateral contracts (promise for promise) and unilateral contracts (promise for something other than a promise). As to unilateral contracts, he accepts (§ 102) in effect the definition of consideration in *Currie v. Misa*, but of bilateral contracts he says (§ 103 F) - "Mutual promises in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void are sufficient consideration for one another." In § 103 G, he discusses the definitions in the Restatement of Contracts, §§ 75, 76. The chief practical distinction between the views of Pollock and Williston (as will be noted in the course of this chapter) is that Williston regards some mutual promises as insufficient consideration which Pollock thinks are sufficient.]

² This statement is adopted by Lord Dunedin, *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* [1915] A. C. 847, 855.

A consideration which consists in performance is said to be *executed*. It is important to remember that in the former case "it is the counter-promise and not the performance that makes the consideration."²

Consideration is that which is actually given and accepted in return for the promise. Ulterior motives, purposes, or expectations may be present, but in a legal point of view they are indifferent. The party seeking to enforce a promise has to show the actual legal consideration for it, and he need not show anything beyond.³

GRATUITOUS PROMISES

An informal promise made without a consideration, however strong may be the motives or even the moral duty on which it is founded, is not enforced by English courts of justice at all. Even a formal promise, that is a promise made by deed, or in the proper technical language a covenant, is deprived, if gratuitous, of some of the most effectual remedies administered by them. A promise to contribute money to charitable purposes is a good example of the class of promises which, though they may be laudable and morally binding, are not contracts.⁴

The early history of the law of Consideration is still somewhat obscure, but some acquaintance with it is necessary for understanding the fluctuations on certain points which lasted well into the nineteenth century, and one or two anomalies which have survived.⁵

HISTORY OF THE TERM

"The name of Consideration appears only late in the fifteenth century," and we do not know by what steps it became a settled term of art. The word seems to have gone through the following significations: first, contemplation in general; then deliberate

² Hobart in *Lamplugh v. Brathwaite* (1616) 1 Sm. L. C. 155.

³ *Thomas v. Thomas* (1842) 2 Q. B. 851; 90 R. R. 903; Finch Sel. Ca. 263. In Patterson J.'s judgment, *ad init.* the words "benefit" and "detriment" are transposed by an obvious slip at p. 859 of 2 Q. B. as pointed out by Finch. In *Cole v. Pukington* (1874) L. R. 19 Eq. 174; 44 L. J. Ch. 381 this case was strangely overlooked.

⁴ *Cottage Street Church v. Kendall* (1877) 121 Mass. 528; [the American authorities, however, are not entirely in harmony with each other; see Williston, *Contracts*, 407, note 11;] *Re Hudson, Creed v. Henderson* (1885) 54 L. J. Ch. 811. A contract may arise, however, if the subscriber authorizes a definite expenditure which is incurred in reliance on his making it good; see *Kedar Nath Bhattacharji v. Gore Mahomed* (1886) 1 L. R. 14 Cal. 64; *qu.* if right on the facts.

⁵ See now for a full historical exposition, Holdsworth, H. E. L. viii, 2—48.

⁷ It is used to signify the reason for which a conveyance is made in a memorandum of a settlement executed by Sir John Fortescue in 1461, published from the Close Roll of 20 Ed. IV. by Miss Cora L. Scofield in E. H. R. xxvii, 323: "And the consideration of the making of the forseyde estate, as was rehersed atte that time, was this," &c. Here we see the term almost in the act of transition to its technical appropriation. Other examples in Holdsworth, viii, at 5—7. The technical sense became definite in the latter half of the seventeenth century.

decision on a disputed question (hence the old form of judgments in the Common Law Courts, "It is considered");⁸ then the grounds as well as the act of deliberation; and lastly, in particular, that which induces a grant or promise. If we wish to form a probable opinion as to the origin or origins of this final modification, we must inquire how far anything like the thing signified was to be found in the old action of debt, or was involved in the necessary elements of the new action of assumpsit. We must also remember that the demand was for an extended remedy on business agreements, and, from the pleader's point of view, for an action which would enable him to rescue an increasing and lucrative branch of practice from the monopoly of ecclesiastical jurisdiction in matters of breach of faith,⁹ and at least to compete on equal terms with the Court of Chancery. Nobody wanted merely fanciful or gratuitous promises to be made binding without form, and there was no need for haste in defining exactly where the line should be drawn.

The action of debt assumed that the defendant had money or chattels¹⁰ which belonged to the plaintiff; either because the defendant had actually received so much from the plaintiff, or because he (or, in the later doctrine, a third person at the defendant's request)¹¹ had received from him something—it might be money, goods, or services—admitted to be equivalent to the money or goods claimed. As the buyer of goods had acquired property in the goods, so did a sum of his money measured by the agreed price become, in the medieval view, the property of the seller. There was a change of property by "reciprocal grants."¹² Thus the debt could not be established without showing that the debtor had received some equivalent or "recompense." In the fifteenth century this equivalent was called *Quid pro quo*, a peculiarly English term.¹³ The words bargain and contract, especially the latter, also came to be associated with the action of debt in the fifteenth and sixteenth centuries. In fact contract meant a "real contract," a transaction on which an action of debt might

⁸ Altered to "adjudged" by the Judicature Act for no obvious reason, unless it were that the word "adjudge" was equally unknown to the operative forms of common law and equity, though it was current with text-writers from the sixteenth century onwards.

⁹ It is said that the King's judges had the remedy of prohibition in their hands. No doubt the spiritual courts often might have been prohibited, and sometimes were; but one has only to look at Hale's *Precedents and Proceedings*, representing a small part of what went on all over the country, to see that in fact they got the business; and the repeated protests of Common Law Judges show that the secular jurisdiction failed to check them: Holdsworth, *H. E. L.* ii, 305.

¹⁰ *Harv. Law Rev.* viii, 260.

¹¹ *Harv. Law Rev.* viii, 262; *Doct. & St.* ii, 24: "After divers that be learned in the laws of the realm . . . if he to whom the promise is made have a charge by reason of the promise, which he hath also performed, then in that case he shall have an action for that thing that was promised, though he that made the promise have no wordly profit by it." I agree with Sir Paul Vinogradoff, *L. Q. R.* xxiv, 383, that this relates to Debt, not Assumpsit.

¹² *Edgeworth v. Dow*, p. 112.

¹³ It is not otherwise known to Du Cange or his later editors.

be brought.¹⁴ Mere one-sided speech could no more pass property in money than in goods.

The action of *assumpsit* was not to recover anything supposed to be the plaintiff's, or for restitution, but to recover damages for the breach of an active duty towards the plaintiff which had been expressly "assumed" by the defendant, or was attached by law to the exercise of his calling. If the defendant's "assumption" had not induced the plaintiff to incur risk or trouble in some way to his own detriment, there was no wrong done and no ground of action. Here again bare words of promise, as such, would create no duty; nor could mere disappointment be regarded as actionable damage. It was a considerable time before the fact that *assumpsit* was in substance an action to enforce contracts was in any way formally recognized; but this could not be much delayed when it was settled that the existence of a debt was a sufficient ground for an action in *assumpsit*,¹⁵ the defendant not being allowed to admit the existence of a duty to pay the plaintiff and deny that he had undertaken to fulfil it.

Thus we have both in debt and in *assumpsit* the notion of some kind of value received as an element in the defendant's liability: in the later application of *assumpsit* concurrently with debt this element is identical with the *quid pro quo* of debt;¹⁶ in the original *assumpsit* founded on an actual promise it is distinct.

Meanwhile the canonists of Europe, in opposition to the more technical views of the civilians, had been generalizing the Roman law of contract and breaking down its formalities. The *causa* which made a pact actionable was no longer one of a limited set of circumstances or "vestments" applicable, according to their nature, to particular and limited classes of transactions; it might be any reason for making a promise which appeared serious enough to be the foundation of a moral duty to fulfil the expectation created. Some English canonists, perhaps, used the word "consideration" with the same or nearly the same meaning as this extended sense of *causa* before it was familiar to the common lawyers. At any rate St. German, in his well-known Dialogue, first published in English in 1530,¹⁷ puts this word in the mouth not of the Student but of the Doctor. The Student in the laws of England, explaining "what is a nude contract or naked promise in the laws of England, and where an action may lie thereupon, and where not"¹⁸ speaks of recompense, of "a nude contract . . .

¹⁴ See H. L. R. viii, 253; the title of Debt in the Abridgments; and even later, *Termes de la Ley*, s. i. Contract.

¹⁵ This is "indebitatus" as distinct from "special" *assumpsit*.

¹⁶ Prof. Ames in Harv. Law Rev. ii, 18.

¹⁷ The Latin ed. (1523, reprinted 1528) contained only the first Dialogue; and this also is amplified in the English version. On the other hand the Latin text has a considerable amount of scholastic authorities and discussion omitted in the English: Vinogradoff, Reason and Conscience in Sixteenth-century Jurisprudence, L. Q. R. xxiv, 373.

¹⁸ Question put by the Doctor, Dial. 2, c. 23, *ad fin.* The discussion follows in c. 24.

where a man maketh a bargain, or a sale of his goods or lands, without any recompense appointed for it," and of "nude or naked promise . . . where a man promiseth another to give him certain money such a day, or to build an house, or to do him such certain service, and nothing is assigned for the money, for the building, nor for the service;" in which cases no action lies." It is the Doctor of Divinity who takes up the distinct question of what promises are binding in conscience, and distinguishes "promises made to a man upon a certain consideration . . . as if A. promise to give B. x*l*. because he hath made him such a house or hath lent him such a thing"—which is generally binding—from a promise which is "so naked that there is no manner of consideration why it should be made," and does not even create a moral obligation. Here the language is not technical, but is rather a literary explanation addressed to the Student, who is presumed not to know civil or canon law, and would not understand the Romanist term *causa*.

The word "consideration" had already been used in English Courts in discussing the validity not of promises but of uses; there is nothing to show any connection with the learning, civilian or canonist, of *causa*, but on the contrary "consideration" in this context is rather analogous to the *quid pro quo* of debt, though wider. On the whole the transitional view of the early sixteenth century seems to have been that a use was created by the will of the grantor, but his will could not be known by the Court without sufficient proof of his intent, and such proof might consist in the mutuality of the transaction (including the creation of a tenure as well as actual value received), or in the existence of a natural duty towards the *cestui que use*. Either kind of reason was called consideration. It is common learning that the mere solemnity of a deed was never held sufficient in this connexion.¹⁹ On the whole the Doctor, who represents the canonist half of St. German's extraordinary learning, appears to use "consideration" as a semi-popular word, which will dispense him from going into technical details, and be sufficiently accurate for his purpose. As the book rapidly became well known for its merits as an exposition of the Common Law, it may well be that this very passage contributed to the current use of the word among the serjeants and apprentices at Westminster, and suggested its application to actions on promises, of which no earlier example has been found.

There is nothing to show that it was so applied by common

¹⁹ It is not manifest whether the author means to allude to the action of *assumpsit* or not. I think he was more likely to regard it as a remedy for a wrong independent of contract, and not to have it before his mind at all in this place. The action on the case for negligence, which was one origin of *assumpsit*, is recognized: "if I take [goods to keep safely], and after they be lost or impaired through my negligent keeping, there an action lieth."

²⁰ Y. B. 20 H. VII. 10, pl. 20; Bro. Ab. Feoffments and Uses, pl. 40. (This is dated 1533, a little later than St. German's book, but practically contemporary.) In *Sharlington v. Stratton* (1565) Plowd. 302, the analogy of *quid pro quo* was relied on in the unsuccessful argument for the plaintiff.

lawyers with any conscious reference to either the civilian or the canonist interpretation of the Roman *causa*; nor had they any need to call in such notions. The *quid pro quo* which the defendant in debt must have received, and the damage which the plaintiff in assumpsit must have suffered by relying on the defendant's undertaking, were sufficient to form the notion of Consideration without any extraneous matter. In fact the Romanist conception could not have been fitted into the English legal categories. In its later canonical form it was too wide for the common lawyer's purposes,²¹ as in its ancient classical form it was too narrow.²²

No one ever argued before an English temporal Court that deliberate bounty or charitable intention will support a formless promise; but such was undoubtedly the canonical view, and is to this day, in theory, the rule of legal systems which have followed the modern Roman law.²³ There was no room within the common law scheme of actions for turning natural into legal obligations.²⁴

THE MODERN DOCTRINE

BENEFIT TO PROMISOR NOT MATERIAL

We may now trace the characteristic points of the English doctrine. It was understood as nearly as the third quarter of the fifteenth century, with reference to the *quid pro quo* of Debt, that

²¹ Save in the point, unknown to English law, that a plaintiff suing on a promise must show that its performance was of some value to himself. Pothier, Obl. §§ 54, 55, 60, Code Nap. 1119. It is said that a promise by A. to B. to do something useful to Z., but not to B., is binding in conscience only. Z. cannot sue because he is not a party to the contract, nor B. because he has no interest in its performance. So the modern civilians interpreted the rule *alteri stipulari nemo potest* and Ulpian's gloss, *ut alii detur nihil interest meo*: D. 45, l. de v. o. 38, § 17. Bracton seems not to have accepted the Roman doctrine: see Maitland, Bracton and Azo, 154-155. It is far from certain that *causa* was really a current term in the early part of the 16th century among any canonists or civilians from whom Englishmen were likely to borrow.

²² Ulpian in one place, D. 19, 5, de praeser. verbis, 15, goes near to a generalization when he says of the promise of a reward for information of a runaway slave: "Conventio ista non est nuda, ut quis dicat ex pacto actionem non oriri, sed haberi in se negotium aliquod." [See, too, Buckland & McNair, Roman Law and the Common Law, 171-177.]

²³ Pothier, Obl. § 42; Sirey and Gilbert on Code Nap. 1131; Demolombe, Cours du Code Nap. xxiv. 329 sqq.; Langdell, Sel. Ca. Cont. 169, so in Germany from the 17th century onwards, with only theoretical differences as to the reason of the rule: Seuffert, Zur Gesch. der obligatorischen Verträge, 130 sqq.

²⁴ The view here given is substantially that of the late Prof. Ames of Harvard (The History of Assumpsit, Harv. Law Rev. n. 1, 53, now reprinted and revised in Select Essays in Anglo-Amer. Legal History, iii, 259), who put the whole subject on a new footing. Mr. Justice Holmes's ingenious earlier attempt to make the *quid pro quo* of debt cover the whole ground, and connect it with the functions of the *secta* in Anglo-Norman procedure, does not seem acceptable: see Pollock & Maitland, Hist. Eng. Law, ii, 214. As to civilian influence, it is impossible to prove that there was none, but for the reasons in the text I think very little of it reached the minds of practising common lawyers. Sir John Salmond's learned argument (Essays in Jurisprudence and Legal History, No. iv) fails to reconvert me to my own former opinion. One may almost say that, if there had been any real borrowing, there must have been more misunderstanding. The repetition of the one phrase *Ex nudo pacto non oritur actio*, caught up from the civilians, was, on the whole, harmless. As late as 1842 a desperate attempt was made by the late E. V. Williams J., when at the bar, to mix up the civilian *causa* with the doctrine of consideration: *Thomas v. Thomas*, p. 131.

apparent benefit to the promisor is immaterial. In 1459 we have this case. Debt in the Common Pleas on an agreement between the plaintiff and defendant that plaintiff should marry one Alice, the defendant's daughter, on which marriage defendant would give plaintiff 100 marks. Averment that the marriage had taken place and the defendant refused to pay. Danvers J. said: "The defendant has *quid pro quo*: for he was charged with the marriage of his daughter and by the espousals he is discharged, so the plaintiff has done what was to be paid for. So if I tell a man, if he will carry twenty quarters of wheat of my master Prisot's to G., he shall have 40s., and thereupon he carry them, he shall have his action of debt against me for the 40s.; and yet the thing is not done for me, but only by my command: so here he shows that he has performed the espousals, and so a good cause of action has accrued to him: otherwise if he had not performed them." Moyle J.: "If I tell a surgeon, if he will go to one J. who is ill, and give him medicine and make him safe and sound, he shall have 100s.; there if the surgeon does cure J. he shall have a good action of debt against me for the 100s., although the thing was done for another and not for the defendant himself; if there is not *quid pro quo*, there is what comes to the same."¹⁶ Prisot C. J. and Danby J. thought that such an action was not maintainable except on a specialty (though Prisot was impressed by Danvers's and Moyle's instances), and an objection was also taken to the jurisdiction on the ground of marriage being a spiritual matter: the case was adjourned and the result is not stated. But the point is quite clearly taken that what a man chooses to bargain for must be conclusively taken to be of some value to him.

ADEQUACY NOT MATERIAL

It is really by a deduction from this that our Courts have in modern times laid it down as an "elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration."¹⁷ The idea is characteristic not only in English positive law but in the English school of theoretical jurisprudence and politics. Hobbes says: "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give."¹⁸ And the legal rule is of long standing, and illustrated by many cases. "When a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action."¹⁹ "A. is possessed of Blackacre, to which B. has no manner of right, and A. desires B. to release him all his right to Blackacre, and promises him in consideration thereof to pay him so much money, surely

¹⁶ M. 37 H. VI. 8, pl. 18.

¹⁷ *Westlake v. Adams* (1858) 5 C. B. N. S. 248, 265; 27 L. J. C. P. 271, per Byles, J. [American law is the same: Williston, § 115.]

¹⁸ *Leviathan*, pt. 1, c. 15.

¹⁹ *Sturlyn v. Albany*, Cro. Eliz. 67; and see Cro. Car. 70, and marginal references there.

this is a good consideration and a good promise, for it puts B. to the trouble of making a release."²⁹ The following are modern examples. If a man who owns two boilers allows another to weigh them, this is a good consideration for that other's promise to give them up after such weighing in as good condition as before. "The defendant," said Lord Denman, "had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive."³⁰ If the owner of a newspaper offers to give advice on financial matters to any one who will send his inquiry to the city editor, writing to the city editor is good consideration for a promise to use reasonable care in giving the advice.³¹ So parting with the possession of a document, though it had not the value the parties supposed it to have,³² and the execution of a deed,³³ though invalid for want of statutory requisites,³⁴ have been held good considerations. In like manner a licence by a patentee to use the patented invention is a good consideration though the patent should turn out to be invalid.³⁵ In the Supreme Court of the United States a release of a supposed right of dower, which the parties thought necessary to confirm a title, has been held a good consideration for a promissory note.³⁶ The modern theory of the obligation incurred by a bailee who has no reward is that the bailor's delivery of possession is the consideration for the bailee's promise to keep or carry safely. The bailor parts with the present legal control of the goods; and this is so far a detriment to him, though it may be no benefit to the bailee, and the bailee's taking the goods is for the bailor's use and convenience.³⁷ The determination of a legally indifferent option in a particular way, as voting for a particular candidate for a charity where there is not any duty of voting for the candidate judged fittest, is legal "detriment" enough to be a good consideration.³⁸ It has been

²⁹ *Holt C.J.* 12 Mod. 459.

³⁰ *Bainbridge v. Fernstone* (1838) 8 A. & E. 743; 53 R. R. 234.

³¹ *De la Brie v. Pearson* [1908] 1 K. B. 280; 77 L. J. K. B. 380. C. A. But perhaps the cause of action is better regarded as arising from default in the performance of a voluntary undertaking independent of contract.

³² *Haigh v. Brooks*, 1830-40 4 Q. B. and Ex. Ch. 10 A. & E. 309, 320, 334; 30 R. R. 399, 407, 417. Or letting the promisor retain possession of a document to which the promisee is entitled: *Hart v. Miles* (1858) 4 C. B. N. S. 371; 27 L. J. C. P. 218.

³³ *Cp. Jones v. Waite* (1842) 9 Cl. & F. 101.

³⁴ See note 28, p. 136. The defendant had in fact had the full benefit of the consideration, the deed having been acted on.

³⁵ *Laure v. Purser* (1856) 6 F. & B. 430; 26 L. J. Q. B. 25; 106 R. R. 868.

³⁶ *Sykes v. Chadwick* (1873) 18 Wallace, 141.

³⁷ O. W. Holmes, *The Common Law*, 201 *seq.* Historically, the explanation is that the action sounded in tort until quite modern times: *ib.* 196. The bailor parts with very little, for, if the bailment is at will, he as well as the bailee can sue a trespasser. The real difficulty, however, is that in such cases, for the most part, the bailor does not deliver possession at the bailee's request, but requests the bailee to take it. One of the necessary elements is therefore fictitious. *Cp. Langdell*, § 68. [Williston, *Contracts*, § 138, objects to the idea of holding that there is any contractual relation in gratuitous bailment, but he admits that in English law *Whitehead v. Greenham* (1825) 2 Bing. 464, seems to be the other way.]

³⁸ *Bolton v. Madden* (1879) L. R. 9 Q. B. 55.

held in equity, to the same effect, that a transfer of railway shares on which nothing has been paid is a good consideration;" and that if a person indebted to a testator's estate pays the probate and legacy duty on the amount of the debt, this is a good consideration for a release of the debt by the residuary legatees: "a strong case, for this view was an afterthought to support a transaction which was in origin and intention certainly gratuitous, and in substance an incomplete voluntary release; the payment was simply by way of indemnity, it being thought not right that the debtor should both take his debt out of the estate and leave the estate to pay duty on it. The consent of liquidators in a voluntary winding-up to a transfer of shares is a good consideration for a guaranty by the transferor for the payment of the calls to become due from the transferee." An agreement to continue *i.e.*, not to determine immediately—an existing service terminable at will, is likewise a good consideration." The principle of all these cases may be summed up in the statement made in so many words by the judges in more than one of them, that the promisor has got all that he bargained for. The law will be satisfied that there was a real and lawful bargain, but it leaves parties to measure their bargains for themselves. It has been suggested that on a similar principle the consideration for a promise may be contingent, that is, it may consist in the future doing of something by the promisee which he need not do unless he chooses, but which being done by him, the contract is complete and the promise binding. But this cannot be. A consideration must be either a present act or forbearance or a promise. If a tradesman agrees to supply on certain terms such goods as a customer may order during a future period, this is not a promise, but an offer. He cannot sue the customer for not ordering any goods, but if, while the offer stands, the customer does order any, the condition of the offer is fulfilled, and the offer being thus accepted, there is a complete contract which the seller is bound to perform."

²⁹ *Cheule v. Kenward* (1858) 3 De G. & J. 27, 27 L. J. Ch. 781.

³⁰ *Taylor v. Manners* (1805) 1 L. R. 1 Ch. 48, 35 L. J. Ch. 126, by Turner L.J., *dub.* Knight Bruce L.J.

³¹ *Clele v. Financial Corporation* (1873) 1 L. R. 16 Eq. 303, 375, 43 L. J. Ch. 54.

³² *Grave v. Barnard* (1874) 1 L. R. 18 Eq. 518, 43 L. J. Ch. 659.

³³ *G. N. Ry. Co. v. Witham* (1873) 1 L. R. 9 C. P. 16, 43 L. J. C. P. 13. Cp. *Chicago & G. E. Ry. Co. v. Dane* (1873) 43 N. Y. 14 Hand. 240, where it was rightly held that a general assent to an offer of this kind (not undertaking to order, or as in the particular case tender to be carried, any definite quantity of goods) did not of itself constitute a contract. [The weight of authority in other States of the U.S. is to the same effect: Williston, § 104 A.] Cp. *R. v. Demers* [1900] A. C. 103; 69 L. J. P. C. 5; under French Canadian law, but no difference in principle is suggested. This seems to have been overlooked in *Ford v. Newth* [1901] 1 K. B. 683; 70 L. J. K. B. 459. *Offord v. Davies* (1862) 12 C. B. N. S. 748; Finch, Sel. Ca. (2nd ed. 1896) 87, the case of a guaranty, limited to twelve months, of bills which the plaintiff might discount at the request of the defendants, involves the same principle; for the so-called guaranty, as explained by the judgment, was in truth only a standing offer. *Lery v. Goldhill* [1917] 2 Ch. 297, might perhaps have been more simply dealt with in like manner. There would be a binding contract by mutual promises if the prospective buyer agreed not to buy elsewhere.

Great inadequacy of consideration may, however, be material in cases of fraud and the like, though material as evidence only. This will be dealt with hereafter.

DISALLOWED AND DOUBTFUL EXCEPTIONS

In the interesting eighteenth-century case of *Pillans v. Van Mierop*⁴⁴ the actual decision was on the principle that "any damage to another, or suspension or forbearance of his right, is a foundation for his undertaking, and will make it binding: though no actual benefit accrues to the party undertaking."⁴⁵ But Lord Mansfield threw out the revolutionary suggestion (which Wilmut J. showed himself inclined to follow, though not wholly committing himself to it) that there is no reason why agreements *in writing*, at all events in commercial affairs, should not be good without any consideration. "A *nudum pactum* does not exist in the usage and law of merchants. I take it that the ancient notion about the want of consideration was for the sake of evidence only . . . In commercial cases amongst merchants the want of consideration is not an objection."⁴⁶ The anomalous character of this dictum was rightly seen at the time, and it has never been followed.⁴⁷ It was too late to set up a new class of Formal Contracts, which was really the effect of Lord Mansfield's proposal. But if it had occurred a century or two earlier to a judge of anything like Lord Mansfield's authority, the whole course of the English law of contract might have been changed, and its principles might have been substantially assimilated to those of the modern civil law as adopted by the law of Scotland.⁴⁸

PAST CONSIDERATION

Another doctrine made current by Lord Mansfield and some of his colleagues with more success⁴⁹ was that the existence of a previous moral obligation constituted such a relation between the

⁴⁴ (1765) 3 Burr. 1663, and Finch Sel. Ca. (2nd ed. 1806) 263.

⁴⁵ Per Yates J. at 1674.

⁴⁶ 3 Burr, 1669-70.

⁴⁷ In 1778 it was distinctly contradicted by the opinion of the judges delivered to the House of Lords in *Rann v. Hughes* (1778) 7 T. R. 350, n.: "All contracts are, by the laws of England, distinguished into agreements by specialty and agreements by parol; nor is there any such third class, as some of the counsel have endeavoured to maintain, as contracts in writing." Langdell ingeniously argued (Summary, §§ 49, 50), that contracts according to the law merchant need on principle no consideration; in short, that a negotiable instrument is a specialty (cp. Holt C.J.'s observations in *Clerke v. Martin* (1701), 2 Ld. Raym. 758, and *Cutting v. Williams*, (1702), 7 Mod. 155). It might have been better so. In this country one can only say *dis aliter iurum*.

⁴⁸ [In 1937, the Law Revision Committee in effect adopted Lord Mansfield's view by recommending that an agreement shall be enforceable if the promise or offer has been made in writing by the promisor or his agent, or if it be supported by valuable consideration past or present: Sixth Interim Report, Cmd. 5449, para. 50 (2), which should be read in conjunction with paras. 29 and 32. For Scots law, see Lord Normand in 55 L. Q. R. (1939), 358-374.]

⁴⁹ See the note to *Wemall v. Adney* (1802), 3 B. & P. 252; 6 R. R. 782; and in Finch Sel. Ca. at 358, which is approved by Parke B. in *Earle v. Oliver* (1848) 2 Ex. 71, at 90, and has long been regarded as classical on the whole question of past consideration.)

parties as would support an express promise. The Exchequer Chamber finally decided as late as 1840, that "a mere moral obligation arising from a past benefit not conferred at the request of the defendant" is not a good consideration.⁵⁰ It is still not quite settled whether a past benefit is in any case a good consideration for a subsequent promise. On our modern principles it should not be,⁵¹ and it is admitted that it generally is not.⁵² For the past service was either rendered without the promisor's consent at the time, or with his consent but without any intention of claiming a reward as of right, in neither of which cases is there any foundation for a contract;⁵³ or it was rendered with the promisor's consent and with an expectation known to him of reward as justly due, in which case there were at once all the elements of an agreement for reasonable reward.⁵⁴ It is said, however, that services rendered on request, no definite promise of reward being made at the time, are a good consideration for a subsequent express promise in which the reward is for the first time defined. But there is no satisfactory modern instance of this doctrine, and it would perhaps now be held that the subsequent promise is only evidence of what the parties thought the service worth.⁵⁵ It is also said that the voluntary doing by one party of something which the other was legally bound to do is a good consideration for a subsequent promise of recompense. But the authority for this proposition is likewise found to be unsatisfactory. Not only is it scanty in quantity, but the decisions, so far as they did not proceed on the

⁵⁰ *Eastwood v. Kington* (1840) 11 A. & E. 438, 446; 52 R. R. 400.

⁵¹ Cp. Langdell, *op. cit.* § 91. [In American law, the general rule is identical with the English rule: Williston, *Contracts*, § 142.]

⁵² *Roscorla v. Thomas* 1842 3 Q. B. 324; 61 R. R. 216; Finch Sel. Ca. 340.

⁵³ "It is not reasonable that one man should do another a kindness, and then charge him with a recompense": 1 Wms. Saund. 356.

⁵⁴ [Nevertheless the Law Revision Committee recommended that past consideration should be sufficient: note 44. But they expressly stated that they did not wish this to affect the existing rules as to (1) the necessity, in the case of revival of a statute-barred debt, of a written promise or acknowledgment; (2) the ineffectiveness of an attempt to ratify, on attaining majority, a promise made during infancy: Cmd. 5449, para. 32. For various criticisms of the Committee's recommendations, see C. J. Hamson in 54 L. Q. R. (1938), 233-257.]

⁵⁵ *Lamplugh v. Braithwaite* (1616) Hob. 105, and 1 Sm. L. C.; see per Erle C.J. 13 C. B. N. S. at 740. The Irish case of *Bradford v. Roulston* (1858) 8 Ir. C. L. Rep. 468, will, for English lawyers at least, hardly outweigh this dictum; and the doctrine seems to be open to examination in the C. A.: see per Bowen L.J. *Stewart v. Casey* [1892] 1 Ch. at 115; 61 L. J. Ch. 61. At an earlier time it was held that a past consideration would not support an action of debt, but was enough for *assumpsit*: *Marsh v. Rainsford* (1528) 2 Leon. 111; *Sidenham v. Warlington* (1595) *ib.* 224; Finch Sel. Ca. 337; O. W. Holmes, *The Common Law*, 286, 297. The theory was still that the breach of promise was an actionable wrong because of an existing relation between the parties which created a special duty, not that an executory contract, as such, created an obligation; and on that theory there was no reason why the promise and the consideration should be simultaneous. For the same reason it was no ground of objection to the action of *indebitatus assumpsit* that the implied promise to pay was posterior to the debt. But Lord Mansfield cannot be supposed to have known anything of this.

[Much the same view as that stated by Pollock in the text, is taken in most of the United States: but a few courts have enforced such promises to pay for a past consideration, even though it was intended to be gratuitous at the moment it was given: Williston, *Contracts*, §§ 144-146.]

now exploded ground that moral obligation is a sufficient consideration, appear to rest on facts establishing an actual tacit contract independent of any subsequent promise.⁴²

Another exceptional or apparently exceptional case which certainly exists is that of a debt barred by the Statute of Limitation, on which the remedy may be restored by a new promise on the debtor's part. It is said that the legal remedy is lost but the debt is not destroyed, and the debt subsisting in this dormant condition is a good consideration for a new promise to pay it. This is not logically satisfying, and in fact it belongs to the now discredited view of past consideration. There is no real equivalent for the new promise, and the only motive that can generally be assigned for it is the feeling that it would be morally wrong not to pay.⁴³ It seems better at this day to say that the law of limitation does not belong to substantive law at all, but is a special rule of procedure made in favour of the debtor, who may waive its protection if he deliberately chooses to do so.⁴⁴

MUTUAL PROMISES

The most characteristic rule in our law of consideration, and the most important for the business of life, is that mutual promises are sufficient consideration for one another. When the subject was still novel it would not have been difficult, one would think, to frame plausible arguments to the contrary. In fact there is no conclusive reason, other than the convenience of so holding,⁴⁵ for the rule that a promise and counter-promise will make one another binding: for neither of them, before it is known to be binding in law, is in itself any benefit to the promisee or burden to the promisor. If it be suggested that the mere utterance of words of promise is trouble enough to be a consideration, the answer is that such is not the nature of the business. Moving of the lips to speak or of the fingers to write is not what the promisor offers or the promisee accepts. However, there is very little trace of discussion in our books. As early as 1555, the validity of reciprocal promises passed without question in a case reported on another point.⁴⁶ In 1615 it was disputed (we are not told on what

⁴² [The cases are collected in 12 English and Empire Digest, 217.]

⁴³ [So, too, Lord Sumner in *Spencer v. Hemmings* [1922] 2 A. C. 507, 524—525.]

⁴⁴ See more on this point in Ch. XIII. [For American law, see Williston, Contracts, §§ 183 seq. An interesting point is the effect of a promise, made at the inception of the contract, never to plead the Statute of Limitations. Such a promise has been upheld in California, but the weight of authority favours the view that the promise is "in violation of the public policy of the statute": *ib.* § 183.]

⁴⁵ The only result of holding otherwise would have been to impose a nominal executed consideration, such as delivery of a nut, a pin, or a farthing, on the formation of contracts by mutual promises: this formality would have become inextricably confused with the archaic but not extinct popular custom of giving earnest. The stretching of principle is quite analogous to the allowance of mere non-feasance as a cause of action in assumpsit. Ames ("Two Theories of Consideration") maintained that the promise is an act, and as good consideration as any other act; which I cannot admit for the reason given in the text.

⁴⁶ *Pecke v. Redman*, Dyer, 113.

grounds), and finally affirmed." The promises must be exchanged for one another at the same time," and each of them must be binding on the face of it, that is, must not be unenforceable for any intrinsic reason. A promise which purports to be merely honorary, or which is invalidated by any rule of general policy or special provision of positive law, is no consideration." It is true that the promise itself, not the obligation thereby created, is the consideration;" still, the value of a promise does not consist in the act of promising, any more than the value of a negotiable instrument consists in a piece of paper with writing on it, but in the assurance of the performance to which the promisor obliges himself, or, at worst, of damages for his default. A promise may be incapable of being sued on," and therefore incapable of being a consideration for a counter-promise, for various reasons which we have examined or shall examine under their proper heads. Such reasons do not form part of the doctrine of Consideration, as is shown by the fact that the same or similar reasons exist and are applied in the modern Roman law and national bodies of law derived from it, where the Common Law rules of Consideration are unknown." In many cases a promisor has the option of avoiding his contract for some cause existing at the date of the promise. But in all such cases the contract is valid until rescinded, and the right to rescind it may be lost by events beyond the promisor's control: so there is no difficulty in treating his promise as a good consideration.

CERTAINTY OF PROMISE

Since a promise which is to be a good consideration for a reciprocal promise must be such as can be enforced, it must be not

¹⁰ *Nichols v. Raynbred*, Hobart 88; Finch Sel. Ca. (2nd ed.) 336. "Nichols brought an assumpsit against Raynbred, declaring that in consideration, that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him fifty shillings: adjudged for the plaintiff in both Courts, that the plaintiff need not to aver the delivery of the cow, because it is promise for promise. Note here the promises must be at one instant, for else they will be both *nuda pacta*." See intermediate cases collected by Prof. Ames in Harv. Law Rev. xiii, 32, n.

¹⁰ *Harrison v. Coge* (1698) 5 Mod. 411; Langdell, "Mutual Promises as a Consideration for each other," Harv. Law Rev. xiv, 496, 504. Some very learned persons add the further condition that the performance of the promise must be such as will or may impose a legal detriment upon the promisor: Prof. Williston's note here in 3rd Amer. ed. [Restatement of Contracts, § 78, is to the like effect.] *Contra*, Langdell, Harv. Law Rev. xiv, 505, with whom I agree.

¹¹ Ames, "Two theories of Consideration," Harv. Law Rev. xiii, 29, 32. But when Prof. Ames suggests, at p. 34, that a promise which is and is known to be merely honorary may be a good consideration, he seems to overlook the undisputed authority of *Harrison v. Coge* (last note). Certainly some men's honorary promises are in fact worth more than some men's legal promises, but the law cannot estimate or regard this. Mr. Justice O. W. Holmes's earlier suggestion that every legal promise is really in the alternative to perform or to pay damages can only be regarded as a brilliant paradox. It is inconsistent with the existence of equitable remedies and with the modern common law doctrine that premature refusal to perform may be treated at once as a breach. [Prof. W. W. Buckland, in 8 Cambridge Law Journal (1944), 247-251, shows it to be untenable]. See 163 U. S. at 600; *Harriman*, § 552.

¹² In many cases a promise may be actionable though not capable, in fact or in law, of performance.

¹³ Thus the question of the performance being possible is irrelevant here. In any case the language of 2 Wms. Saund. 430 and of the dicta there relied on is much too wide.

only lawful but reasonably definite. Thus a promise by a son to his father to leave off making complaints of the father's conduct in family affairs is no good consideration to support an accord and satisfaction, for it is too vague to be enforced.⁶⁴ And upon a conveyance of real estate without any pecuniary consideration a covenant by the grantee to build on the land granted such a dwelling-house as he or his heirs shall think proper is too vague to save the conveyance from being voluntary within 27 Eliz. c. 4.⁶⁵

PROMISE OR PERFORMANCE OF EXISTING DUTY

Similarly, neither the promise to do a thing nor the actual doing of it will be a good consideration if it is a thing which the party is already bound to do either by the general law or by a subsisting contract with the other party.⁶⁶ It seems obvious that an express promise by A. to B. to do something which B. can already call on him to do can in contemplation of law produce no fresh advantage to B. or detriment to A.⁶⁷ But the doing or undertaking of anything beyond what one is already bound to do, though of the same kind and in the same transaction, may be a good consideration. A promise of reward to a constable for rendering services beyond his ordinary duty in the discovery of an offender is binding.⁶⁸ It may however in cases of this class be a nice question whether the agreement is not an attempt to fetter a public servant's discretion as to the manner of executing an admitted duty; and in any case the public interest must not be prejudiced.⁶⁹ So is a promise of extra pay to a ship's crew for continuing a voyage after the number of hands has been so reduced by accident as to make the voyage unsafe, so that the crew are not bound to proceed under their original articles.⁷⁰ So, it is conceived, would be a promise in consideration of the promisee doing at a particular time, or in a particular way, something which otherwise he must do, but has the choice of doing in more than one way, or at any time within certain limits. Again, there will be consideration enough for the promise if an existing right is altered or increased remedies given. Thus an agreement to give a debtor time in consideration of his

⁶⁴ *White v. Bluet* (1853) 23 L. J. Ex. 36; 98 R. R. 492; this seems the *ratio decidendi*, though so expressed only by Parke B., who asked in the course of argument, "Is an agreement by a father in consideration that his son will not bore him a binding contract?"

⁶⁵ *Rasher v. Williams* (1875) L. R. 20 Eq. 210; 44 L. J. Ch. 419.

⁶⁶ See Leake (8th ed. 1931), 464-466; and besides authorities there given, *Deacon v. Grudley* (1854) 15 C. B. 295; 24 L. J. C. P. 17; 100 R. R. 357; and the judgment on the 7th plea in *Mallalieu v. Hodgson* (1851) 16 Q. B. 689; 20 L. J. Q. B. 339; 89 R. R. 679.

⁶⁷ Some American courts, however, hold otherwise: *Harriman on Contracts*, § 117. [Cf. *Williston, Contracts*, §§ 130-133.]

⁶⁸ *England v. Davidson* (1840) 11 A. & E. 856; 52 R. R. 522.

⁶⁹ *Glasbrook Bros. v. Glamorgan County Council* [1925] A. C. 270; 94 L. J. K. B. 272, allowing a claim for special police protection not without weighty dissents both in H. L. and in C. A. Disputes as to charges for extras are familiar in continuing contracts for work, especially building, where the only question is of construction.

⁷⁰ *Hartley v. Ponsonby* (1857) 7 E. & B. 872; 26 L. J. Q. B. 322; 110 R. R. 867.

paying the same interest that the debt already carries is inoperative, but an agreement to give time or accept reduced interest in consideration of having some new security would be good and binding. [For more detail as to this, see pp. 149 seq.] The common proviso in mortgages for reduction of interest on punctual payment—i.e., payment at the very time at which the mortgagor has covenanted to pay it—seems to be without any consideration, and it is conceived that if not under seal such a proviso could not be enforced.⁷¹ Again, the rule does not apply if the promise is in the nature of a compromise, that is, if a reasonable doubt exists at the time whether the thing promised be already otherwise due or not, though it should be afterwards ascertained that it was so. We shall return to this when we speak of forbearance as a consideration.

Difficult questions arise when we have a promise made in consideration of the promisee doing or promising to do something which a subsisting contract with a third person has already bound him to do. Such cases are not frequent, and there has not yet been any full or satisfying judicial discussion of them. It would seem that, being infrequent and of no great importance in current affairs, they should be disposed of by the strict application of settled principles, and that, even if such application should lead to apparently fine distinctions, the principles ought not to be tampered with merely to avoid that result. From this point of view, Andrew's performance of his binding promise to Peter does not appear capable of being a consideration for a new promise by John to Andrew; not because it cannot be beneficial to John, for this it may very well be, but because in contemplation of law the performance is no new detriment to Andrew, but on the contrary is beneficial to him, inasmuch as it discharges him of an existing obligation. Therefore the necessary element of detriment to the promisee is wanting.⁷² It seems therefore that if a promise is given in exchange merely for the performance of the promisee's duty under an existing contract with a third person, it is not binding. Authority, however, is the other way so far as it goes. Performance of this kind appears to have been held a sufficient consideration in three English reported cases,⁷³ one from the early seventeenth and two from the middle part of the nineteenth

⁷¹ This could be provided against, however, if so desired, by fixing the times for "punctual payment" a single day earlier than those named in the mortgagor's covenant.

⁷² In point of fact there may be some, for it may be that he might have omitted the performance with impunity. But this is like the case of a merely honorary promise. The law is made to fit the normal conditions of men's affairs. If every man's word were as good as his bond, or nobody cared to enforce his rights, there would be no place for any law of contract at all.

⁷³ The point might perhaps have been considered in *Jones v. Waite* (1839, 1842) 5 Bing. N. C. 341; 9 Cl. & F. 88; 50 R. R. 705, 717, but the argument and decision were on other grounds. Note that in both *Shadwell v. Shadwell* and *Scotson v. Pegg* (p. 145) it is by no means easy to be sure whether the Court thought the consideration was performance or promise, or whether the performance was exactly the performance of an existing obligation. See Harv. Law Rev. xvii, 75.

century. In the first of these⁷⁴ the plaintiff and defendant were jointly liable as sureties on a bond, long before the modern equitable doctrine of contribution between co-sureties was established. In consideration of the plaintiff paying the whole debt, the defendant promised to repay him half. The promise was held binding, but the real difficulty does not appear to have been dealt with. In the second case,⁷⁵ the plaintiff, being engaged to be married, did (on the facts as assumed) proceed with the marriage on the faith of a promise by his uncle, the defendant's testator, to pay him an annuity during the promisor's life. The plaintiff succeeded in an action for arrears of the annuity. To the majority of the Court it appeared sufficient to say that the marriage took place at the testator's request. But this (whether rightly said or not) does not answer the question whether the simple fulfilment of a promise of marriage already binding on him could be any legal detriment to the promisee. The third case,⁷⁶ in an entirely different subject-matter, also goes on the ground of the performance being, in point of fact, both a benefit to the promisor and a detriment to the promisee. Here the defendant's promise was to unload a cargo of coal at a certain rate in consideration of the plaintiff delivering the coal to him, which the plaintiff was already bound to do under a prior contract with the shippers of the coal, from whom the defendant had bought it. There is a suggestion in the course of the argument that the performance requested by the defendant may have added new terms, as to time and manner of delivery, to that which the plaintiff was already bound to do, and it may be that the plaintiff was entitled to succeed on that point, if properly raised. But there is nothing of the kind in the judgments. It seems to be assumed that the rule must be the same whether the consideration relied upon is a performance already due to a third party or a new promise thereof to the defendant. And so the Supreme Court of Massachusetts thought forty years ago.⁷⁷ The validity of this assumption must, however, be examined.

⁷⁴ *Bagge v. Slade* (1616) 3 Bulst. 102. This decision was apparently forgotten until Prof. Ames called attention to it.

⁷⁵ It is certainly not touched by the statement, perfectly correct in itself, of Dodderidge J. "If the consideration puts the other to charge, though it be no ways at all profitable to him who made the promise, yet this shall be a good consideration to raise a promise."

⁷⁶ *Shadwell v. Shadwell* (1860) 9 C. B. N. S. 159; 30 L. J. C. P. 145, Byles J. *dis.* chiefly on the ground that there was really no *animus contrahendi*, but only an act of bounty: cp. Langdell, § 68 [and the comment in *A.-G. for Ontario v. Perry* [1934] A. C. 477, 484; 103 L. J. K. B. 145]. If there were any *animus contrahendi*, an acceleration of the marriage at the testator's request would no doubt have made a good consideration, but that was not averred.

⁷⁷ *Scotson v. Pegg* (1861) 6 H. & N. 295; 30 L. J. Ex. 225.

⁷⁸ *Abbott v. Doane* (1895) 163 Mass. 433; and see the judgment of Wilde B. in *Scotson v. Pegg*. At first sight it looks impossible, as at one time it did to myself, that a promisee can be a good consideration if performance of the thing promised would not. But the seeming paradox vanishes when we bear in mind that the true test of consideration is not benefit to the promisor but detriment to the promisee. As this was wholly ignored in *Scotson v. Pegg*, the judgments in that case are un instructive.

Let us now take the case of a promise by John to Peter to do something which he has already promised William to do. Such a promise may obviously create a moral obligation; for Peter may in many ways have a just and reasonable interest in being assured that John will perform his contract with William. Then is there any reason why it should not create legal obligation, if supported by a sufficient consideration on Peter's part? The promise is a new and distinct promise, creating on the face of it, a new and distinct duty to a new party. Duties to several parties to perform the same thing are simultaneously created in many quite common forms of covenants. Why should they not be created by successive and independent acts? Will any one deny that John's promise to Peter will be binding if given in exchange for a performance—say immediate payment of money—by Peter? If it is not, this must be the result of some special rule of legal policy, for no other objection seems possible. But of any such rule of policy there is no trace. If then the promise is binding when given for a performance, why should it be less binding when it is given in exchange for Peter's promise? There is no reason in the nature of the case for making any difference. If there were a positive rule of law founded on reasons of policy for not allowing John's promise to Peter to perform his contract with William to be good then John's promise would be no consideration, but only because even though supported by sufficient consideration on the other side and satisfying all ordinary requisites it was deprived of validity by the positive rule and therefore made incapable of having any value in contemplation of law. But again, no such positive rule can be produced. It has been said that John's promise is a good consideration only if it is binding and we have no right to assume that it is binding. The answer to this objection is that if John's promise can be binding it is made so by the counter-promise and it is for the objector to show that it cannot be. The objection in truth if good for anything is equally good to prevent mutual promises from ever being a consideration for each other, for in every such case neither promise taken by itself is of any legal force or value.

There is no objection in any case to a promise by John to Peter not to rescind a subsisting contract with William or not to accept a waiver or release of it and a promise in that form would certainly be a good consideration.

No direct decision has been made in England on the validity of a promise to perform an existing contract with a third person. A negative solution could not be given, it is apprehended, without overruling the cases in which apparently, performance has been

⁷⁹ Prof. Williston, upholding the objection originally raised by Sir W. Anson (now at p. 94, 17th ed., [but see now 19th ed. 99-100]), perceived this, and proposed to meet the difficulty by constructing an entirely new theory of mutual promises. *Harv. Law Rev.* vii, 27. Cp. pp. 147-148.

held sufficient; while a positive one, if the argument above submitted be sound, might be given for independent reasons. Not that I am at all desirous of upholding the authority of the cases in question. I venture to submit, on the contrary, that they were wrongly decided, or at any rate not on satisfactory grounds. What is here maintained is that a promise made for valuable consideration, and otherwise good as between the parties, is not the less valid because the performance will operate in discharge of an independent liability of the promisor to a third person under an independent contract already existing. This was the opinion of W. M. Leake,¹⁰ a most accurate lawyer, and of Prof. Langdell of Harvard.¹¹ [In 1937, the Lord Chancellor's Law Revision Committee recommended that an agreement in which A. makes a promise in consideration of B. doing or promising to do something which B. is already bound by law, or by contract with C., to do, shall be deemed to have been made for valuable consideration.¹²]

RULE IN PINNELL'S CASE, ETC.

The doctrine of Consideration has been extended with not very happy results beyond its proper scope, which is to govern the formation of contracts, and has been made to regulate and restrain the discharge of contracts. For example, where there is a contract of hiring with a stipulation that the wages due shall be forfeited in the event of the servant being drunk, a promise not under seal to pay the wages notwithstanding a forfeiture is not binding without a new consideration.¹³ It is the rule of English law (now

¹⁰ It may be worth while to cite the language of his first edition (1867), 321. "If a man has already contracted with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual; but where there has been a promise to one person to do a certain thing, it is possible to make a promise to another to do the same thing, which may form a valid consideration in a contract with that other." In later editions the wording is altered and simplified but the substance is the same (8th ed. (1931), 465). As to *Morton v. Burn* (1837) 7 A. & E. 19, cited by Leake in support, see L. Q. R. xxii, 323. Leake's opinion was long overlooked.

¹¹ There has been extraordinary divergence of learned opinions. Anson, *Contract*, held neither performance nor promise a good consideration in this class of cases [but the learned editor of the current edition (19th, 1945) inclines to the opposite view]. Ames (Harv. Law Rev. xii, 515; xiii, 29, 35) and Prof. Harriman (*Contracts*, 67) admit both. Leake (last note), Langdell, *Summary*, §§ 54, 84; Harv. Law Rev. xiv, 496, and Prof. Joseph H. Beale, jr., Harv. Law Rev. xvii, 71, disallow performance and allow promise, and with them, for the reasons given in the text, I agree. But if such cases were common there would be no great harm in allowing performance as well on the ground of convenience. In America [the great weight of authority is against the validity of such agreements, but nevertheless some of the cases hold that they are good, whether the party already bound to X. merely assents to Y's promise or expressly promises Y to do what he is already bound to do: Williston, *Contracts*, § 131. The learned author regards the decisions as indefensible on a logical view of consideration, but he sees no practical reasons "for holding invalid the agreement of a contractor with a third person to do what has already been promised if there is no fraud or oppression practised which would make the agreement voidable in any case": *id.* § 131 A. The Restatement of Contracts, § 84, in effect embodies his view and upholds such agreements.]

¹² [Sixth Interim Report, Cmd. 5449, paras. 36, 50.]

¹³ *Monkman v. Shepherdson* (1840) 11 A. & E. 411; 52 R. R. 390.

referred to the same reason, though really older)" that a debt of 100*l.* may be perfectly well discharged by the creditor's acceptance of a beaver hat or a peppercorn, or of a negotiable instrument for a less sum," at the same time and place at which the 100*l.* are payable, or of ten shillings at an earlier day or at another place, but that nothing less than a release under seal will make his acceptance of 99*l.* in money at the same time and place a good discharge:" although modern decisions have confined this absurdity within the narrowest possible limits." [In 1937, the Law Revision Committee recommended its abolition with the proviso that, if the agreement to pay less than the full debt be not performed, the original obligation shall revive."] A judgment creditor agreed in writing with the debtor to take no proceedings on the judgment in consideration of immediate payment of part of the debt and payment of the residue by certain instalments; here there was no legal consideration for the creditor's promise, and he was entitled to claim interest on the debt though the whole of the principal was paid according to the agreement." This rule does not touch the ordinary case of a composition between a debtor and several creditors; for every creditor undertakes to accept the composition in consideration of the like undertaking of the other creditors as well as of the debtor's promise to pay it." [No doubt there is consideration as between the creditors, but what consideration does the debtor give for the creditors' acceptance of less than their debts? In *Good v.*

¹¹ See *Harv. Law Rev.* xlii, 521.

¹² *Goddard v. O'Brien* (1832) 9 Q. B. D. 37; [In *Hirachand Punamchand v. Temple* [1911] 2 K. B. 330, 340, Fletcher Moulton, L.J., questioned whether the Court in *Goddard v. O'Brien* had correctly interpreted the facts]. *Bidder v. Bridges* (1887) 37 Ch. Div. 406; 57 L. J. Ch. 300. Or a less sum in a different currency. *City of San Juan v. St. John's Gas Co.* (1904) 195 U. S. 510. [Mere retention by the payee of a cheque for less than the amount due to him is not conclusive of the cheque being a satisfaction of the debt; whether it is so depends upon the terms upon which it was received by the payee; *Day v. McLean* (1889) 22 Q. B. D. 610; 58 L. J. Q. B. 293.]

¹³ *Pinnel's case* (1602) 5 Co. Rep. 117, confirmed with reluctance by the House of Lords in *Foakes v. Beer* (1884) 9 App. Ca. 605, 54 L. J. Q. B. 130, Lord Blackburn all but dissenting. The Indian Contract Act's 63, illust. b.) is accordingly careful to express the contrary. The rule in *Pinnel's case*, it may be noted, though paradoxical, is not anomalous. Its numerical logic may be archaic, but it is strictly logical. The Court does not know judicially what a beaver hat may be worth, but it must know that 10*l.* are not worth 20*l.*

¹⁴ See the notes to *Cumber v. Wane* (1719) in 1 Sm. L. C.

¹⁵ [Sixth Interim Report, Cmd. 5449, paras. 33, 35, 50 (3). The Committee considered that creditors frequently act upon the principle that it may be more beneficial to them to accept prompt payment of part of their demands than to insist on payment of the whole, and that this is so not only where the credit of the debtor is doubtful but often also where he is perfectly solvent. That was Lord Blackburn's opinion in *Foakes v. Beer* (1884) 9 App. Ca. 605, 622, and the Committee fully accepted it. Lord Blackburn did not press his view, in deference to his colleagues who thought otherwise.]

¹⁶ *Foakes v. Beer* (1884) 9 App. Ca. 605; 44 L. J. Q. B. 130, foll. in *Underwood v. Underwood* [1894] P. 204; 63 L. J. P. 109. But where the solicitor of a defendant entitled to taxed costs accepted from the plaintiff's solicitor a cheque for the amount of costs (nothing being said about interest), this was held to be accord and satisfaction for everything due, and the defendant was not allowed to issue execution for the interest: *Bidder v. Bridges* (1887) 37 Ch. Div. 406; 57 L. J. Ch. 300.

¹⁷ *Good v. Chesseman* (1831) 2 B. & Ad. 328; Finch Sel. Ca. 343; 36 R. R. 574.

Cheeseman,¹¹ the debtor undertook to pay two-thirds of his income to a trustee to be nominated by the creditors and, as this was something different from direct payment to the creditors, it constituted consideration on his part.¹² But supposing that the debtor does nothing more than pay less than the full amount due to his creditors, it is difficult to see what consideration he gives for their release of the balance.¹³ Perhaps the best explanation of the binding force of a composition with creditors rests, not so much upon the doctrine of consideration, as upon the principle that if a creditor, after entering into such a composition, were allowed to sue the debtor for the balance of his debt, he would be committing a fraud on the other creditors.¹⁴

If it is agreed between creditor and debtor that the duty shall be performed in some particular way different from that originally intended, this may well be binding: for the debtor's undertaking to do something different though only in detail from what he at first undertook to do, or even relinquishing an option of doing it in more ways than one, would be consideration enough, and the Court could not go into the question whether it gave any actual advantage to the creditor. But if the new agreement amounts to saying that the debtor shall at his own option perform the duty as at first agreed upon or in some other way, it cannot be binding without a new consideration: as where an entire sum is due, and there is an agreement to accept payment by instalments, this would be good, it seems, if the debtor undertook not to tender the whole sum: but in the absence of anything to show such an undertaking, the agreement is a mere voluntary indulgence, and the creditor remains no less at liberty to demand the whole sum than the debtor is to pay it.¹⁵

FORBEARANCE AS CONSIDERATION

The loss or abandonment of any right, or the forbearance to exercise it for a definite or ascertainable time, is for obvious reasons as good a consideration as actually doing something. In *Mather v. Lord Maidstone*¹⁶ the loss of collateral rights by the promisee supported a promise notwithstanding that the main part

¹¹ Note **

¹² [See *West Yorks Dairacq Agency, Ltd v. Coleridge* [1911] 2 K. B. 326, 328; 80 L. J. K. B. 1122; *Re William Porter & Co., Ltd* [1937] 2 All E. R. 361].

¹³ [Pace Williston, *Contracts* (ed. 1936), § 126, where the learned author suggests four possible ways in which such consideration may be found, none of these, according to English ideas, appears to be doing more than the debtor is already legally bound to do.]

¹⁴ [*Wood v. Roberts* (1818) 2 Stark. 417; *Buller v. Rhodes* (1794) 1 Esp. 236. Cf. Anson, *Contract* (19th ed.), 103—105.]

¹⁵ *McManus v. Bark* (1870) L. R. 5 Ex. 65; 39 L. J. Ex. 65. Cf. *Foakes v. Beer*, note **. As to payment of a sum due into a particular bank, see *Vanbergen v. St Edmund's Properties* [1933] 2 K. B. 223, where the C. A. held on the facts that the variation as to the place of payment was allowed at the promisor's own request.

¹⁶ (1856) 16 C. B. 273; 25 L. J. C. P. 310; 107 R. R. 290.

of the consideration failed. The action was on a bill of exchange. This bill was given and indorsed to the plaintiff as in renewal of another bill purporting to be accepted by the defendant and indorsed to the plaintiff. The plaintiff gave up the first bill to the defendant; thirty days afterwards it was discovered that it was not really signed by the defendant, yet it was held that he was liable on the second bill, for the plaintiff had lost his remedy against the other parties to the first bill during the time for which he had parted with the possession of it, and that was consideration enough.

[It is clear from the foregoing analysis that an existing debt is no consideration for a subsequent promise by the creditor to give the debtor time for payment," and that, if a debt carries interest, such a promise is equally devoid of consideration if it is merely in return for the debtor's undertaking to pay the interest." But Pollock does not deal with the question whether there are, in current law, any exceptions to the rule that an antecedent debt cannot constitute consideration for a promise. As to this, authorities support the following propositions: (1) An existing debt may be consideration for the assignment of a chose in action" to the creditor, provided (i) he is informed of the assignment,¹ and (ii) the creditor gives forbearance with respect to his claim for the debt:² even if this forbearance were subsequent to the giving of the security constituted by assignment of the chose in action, but nevertheless were accorded in consequence of it, the antecedent debt is a valid consideration for the assignment, "though in a sense it is an *ex post facto* consideration. (2) An existing debt is consideration for the giving of a negotiable security,⁴ and it is immaterial whether the security is payable immediately or in the future. (3) An existing debt is consideration for the transfer of a bill of lading so as to defeat the right of stoppage *in transitu*; *Leask v. Scott Bros.*,⁵ where the Court of Appeal thought that in these circumstances the consideration, though past, has a present operation in that it stays the hand of the creditor. There is no certain authority for any addition to

⁹⁷ [*Williams v. Stern* (1880) 5 Q. B. D. 409; 49 L. J. Q. B. 663].

⁹⁸ [*Skerry v. Preston* (1813) 2 Chit. 245. *Orme v. Gallowsby* (1854) 9 Lx. 544, 23 L. J. Ex. 118].

⁹⁹ [The law as to assignment is considered, *post*, 170 *seq.*]

¹ [*Wigan v. English & Scottish Law Life Assurance Association* [1909] 1 Ch. 291 (C.A.); 78 L. J. Ch. 120].

² [*Wigan's Case* (note 1). *Glegg v. Bromley* [1912] 3 K. B. 474 (C. A.); 81 L. J. K. B. 1081. *Re Wethered* [1926] Ch. 167; 95 L. J. Ch. 127].

³ [Parker, J., in *Wigan's Case* [1909] 1 Ch. 291, 298; Lawrence, J., in *Re Wethered* [1926] Ch. 167, 177; Fletcher Moulton, L. J., in *Glegg v. Bromley* [1912] 3 K. B. 474, 486—487, said that even if there were no pressure put upon the debtor by the creditor in order to get the assignment, but the creditor knows of the assignment, the law will, if it possibly can, give effect to the likelihood of the assignment making the creditor more forbearing. An interesting earlier illustration is *Chouens v. Baylis* (1862) 31 Beav. 351; 31 L. J. Ch. 757].

⁴ [*Currie v. Misa* (1875) L. R. 10 Ex. 153; 44 L. J. Ex. 94].

⁵ [(1877) 2 Q. B. D. 376; 46 L. J. Q. B. 576].

these three exceptions.* In *Flight v. Reed*⁷ bills of exchange had been given after the repeal of the usury law, in renewal of bills given while that law was in force; held by Pollock, C.B., and Wilde, B. (Martin, B. dissenting), the bills were valid. The majority judgment was delivered by Pollock, C.B., who conceded that in general a moral obligation is not sufficient consideration, but said, "a loan of money is a very different thing. The very name of a loan imports that it was the understanding and intention of both parties that the money should be repaid." The decision itself in *Flight v. Reed* is regarded as bad law in some modern text-books,⁸ and is simply ignored in others.⁹ My conclusion is that, apart from the three exceptions mentioned above, an existing debt is not *per se*, at the present day, consideration for a subsequent promise.]

As to forbearance, the commonest case of this kind of consideration is forbearing to sue. Forbearance for a reasonable time is enough, on the principle of *certum reddi potest*: and terms in themselves vague, such as "forbearing to press for immediate payment," may be construed by help of the circumstances and context as meaning forbearance for a reasonable time. A promise to guarantee a debt if the creditor will give time to the principal debtor is in the first instance an offer: it becomes a binding promise when the condition of giving the specified time, or a reasonable time, has been performed. It is a question of fact what is reasonable time in a given case.¹⁰ Forbearance of proceedings to enforce

* [Cases like *Thorndike v. Hunt* (1859) 3 De G. & J. 563; 28 L. J. Ch. 417, and *Taylor v. Blakelock* (1886) 32 Ch. D. 560; 56 L. J. Ch. 390, relate to the meaning of "valuable consideration" in connexion with the claim of a transferee of trust property that he has acquired a good title to it because he is a *bona fide* purchaser for value. In *Thorndike v. Hunt*, trustees paid into court a trust fund, part of the moneys in which did not belong to the fund, but to X; held, the transfer was for valuable consideration so as to defeat X's title; but it is not clear whether Knight Bruce, L.J., regarded the antecedent debt of the trustees (their obligation to pay the fund into court) as in itself sufficient consideration, for he added a reference to the possibility of the court obtaining the money from the trustees by other means; 3 De G. & J. at p. 570. In *Taylor v. Blakelock*, Cotton, L.J., held, not that the consideration was an existing debt, but that it consisted in the creditor having given up the right to sue for the debt, and this seems an accurate and sufficient ground for the decision of the Court of Appeal. Bowen, L.J., made a wider statement: "By the common law . . . the payment of an existing debt is a payment for valuable consideration. That was always the common law before the reign of Queen Elizabeth; as well as since." (32 Ch. D. at p. 570); but the succeeding paragraph in his judgment shews that he meant no more than that payment of a debt discharges the debtor's obligation].

⁷ [(1863) 1 H. & C. 703; 32 L. J. Ex. 265].

⁸ [Anson, *Contract* (18th ed.), 109-110. Pollock, *post*, p. 526.]

⁹ [Chitty, *Contracts* (19th ed.). Leake, *Contracts* (8th ed.). Salmond & Winfield, *Contracts*.]

¹⁰ *Oldershaw v. King* (1857) (Ex. Ch.) 2 H. & N. 517; 27 L. J. Ex. 120; and see 1 Wms. Saund. 225. Actual forbearance at the defendant's request, though not for any specified time, may be sufficient: *Alliance Bank v. Broom* (1864) 2 Dr. & Sm. 289; 34 L. J. Ch. 956, approved in *Fullerton v. Provincial Bank of Ireland* [1903] A. C. 309. Cp. *Wilby v. Elgee* (1875) L. R. 10 C. P. 497. In *Cress v. Hunter* (1887) 19 Q. B. Div. 341; 56 L. J. Q. B. 518, which has been criticized as ambiguous, L. Q. R. iii, 484, it must be taken, with the head-note, that the consideration was actual forbearance. The promise being in the form of a promissory note, i.e., essentially unconditional, certainly makes a difficulty, for it would seem there was

a "debt of honour" by purely conventional sanctions has more than once been held a good consideration.¹¹

That which is forborne must be the exercise or enforcement of some legal or equitable right which is honestly believed to exist. This is simply the converse of a rule already given. As a promise by A. to B. is naught if it is only a promise to do something A. is already bound, either absolutely or as against B., to do, so it is equally worthless if it is a promise not to do something which B. can already, as a matter either of public or of private right, forbid A. to do. So far we assume the existing rights of the parties to be known: but as in practice they often are not known, but depend on questions of law or of fact, or both, which could not be settled without considerable trouble, common sense and convenience require that compromises of doubtful rights should be recognized as binding, and they constantly are so recognized. "If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value"¹² and such forbearance is good consideration for a promise even though the claim is not well founded, provided it is honestly believed in and the promisee does not conceal from the promisor any fact which to his knowledge would affect its validity.

The real consideration and motive of a compromise, as well in our law as in the civil law and systems derived from it, is not the sacrifice of a right (of which the existence or non-existence is unknown until it has been judicially determined) but the abandonment of a claim.¹³ The same rule applies in the case where the claim given up is on a disputed promise of marriage.¹⁴ A partial compromise in which the undertaking is not simply to stay or not to commence legal proceedings, but to conduct them in some par-

a complete promise before the consideration, viz., forbearing to sue for a reasonable time, was or could be executed. On the principle see per Bowen L. J. in *Miles v. New Zealand Alford Estate Co.* (1885-6) 32 Ch. Div. at 264.

¹¹ *Ex parte Martingell* [1904] 2 K. B. 133; 73 L. J. K. B. 446; *Goodson v. Grierson* [1908] 1 K. B. 761; 77 L. J. K. B. 507; C. A. [In order to avoid any misapprehension of the statement in the text, it should be added that in these cases of "debts of honour," the mere promise by A. to forbear from suing B. for the recovery of such a debt, in return for B.'s promise to pay it, is no consideration for B.'s promise, for no action is maintainable to enforce a void contract: *Potchalhoff v. Teagle* [1938] 2 K. B. 816; 107 L. J. K. B. 670. If, however, A.'s promise is not simply to forbear from suing for the debt, but also to refrain from putting in force a "purely conventional sanction" (e.g., to refrain from posting B. as a defaulter for not paying his gambling debt to A.), A.'s promise constitutes good consideration: *Hyams v. Stuart King* [1908] 2 K. B. 696; 77 L. J. K. B. 794.]

¹² *Miles v. New Zealand Alford Estate Co.* (1885-6) 32 Ch. Div. 266. Bowen L. J., at 291, reviewing previous cases and dicta. [Note that in *Portafino (Owners of) v. Berlin Dermaphia* (1934) 39 Com. Cas. 330, the C.A. were emphatic that both conditions must be fulfilled.—the claim must be serious (i.e., not vexatious) and it must be *bona fide*.]

¹³ *Cotton, L. J.* 32 Ch. Div. at 284.

¹⁴ *Triggs v. Lavallée* (1864) 15 Moo. P. C. 271, 292 (a case from Lower Canada, then under old Fr. law); *Wilby v. Elgee* (1875) L. R. 10 C. P. 497; 44 L. J. C. P. 254. The remarks of Maule J. in *Martindale v. Faulkner* (1846) 2 C. B. at 719; 60 R. R. at 611, are still profitable.

¹⁵ *Keena v. Handley* (1864) 2 D. J. S. 283.

ticular manner or limit them to some particular object, may well be good: but here again the forbearance must relate to something within the proper scope of such proceedings. A promise to conduct proceedings in bankruptcy so as to injure the debtor's credit as little as possible is no consideration, for it is in truth merely a promise not to abuse the process of the Court.¹⁶

CONTRACTS UNDER SEAL

The main end and use of the doctrine of Consideration in our modern law is to furnish us with a comprehensive set of rules which can be applied to all informal contracts without distinction of their character or subject-matter. Formal contracts remain, strictly speaking, outside the scope of these rules, which were not made for them, and for whose help they had no need. But it was impossible that so general and so useful a legal conception as that of Consideration should not make its way into the treatment of formal contracts, though with a different aspect. The ancient validity of formal contracts could not be amplified, but it might be restrained: and in fact both the case law and the legislation of modern times show a marked tendency to cut short if not to abolish their distinctive privileges, and to extend to them as much as possible the free and rational treatment of legal questions which has been developed in modern times by the full recognition of informal transactions.

This result is mainly due to the action of the Court of Chancery. A merely gratuitous contract under seal is enforceable at common law (with some peculiar exceptions) unless it can be shown that behind the apparently gratuitous obligation there is in fact an unlawful or immoral consideration. Courts of equity did not, in the absence of any special ground of invalidity, interfere with the legal effect of formal instruments: but they would not extend their special protection and their special remedies to agreements, however formal, made without consideration. A voluntary covenant though under seal, "in equity, where at least the covenantor is living," or where specific performance of such a covenant is sought . . . stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed."¹⁷ And this restriction is not affected by the union of legal and equitable jurisdiction in the High Court of Justice. The rule that a court of equity will not grant specific performance of a gratuitous agreement is so well settled that it is needless to cite further authorities for it: and it is not to be overlooked that whereas the other rules

¹⁶ *Bracewell v. Williams* (1866) 1 L. R. 2 C. P. 196.

¹⁷ We shall see under the head of undue influence that a system of presumptions has been established which makes it difficult in many cases for persons claiming under a voluntary deed to uphold its validity if the donor, or even his representatives, choose within any reasonable time afterwards to dispute it.

¹⁸ *Per Knight Bruce L.J. Kekerich v. Manning* (1851) 1 D. M. G. 176, 188; 91 R. R. 53, 57.

that limit the application of this peculiar remedy are of a more or less discretionary kind, and founded on motives of convenience and the practical requirements of procedure rather than on legal principle, this is an unqualified substantive rule.

It is the practice of equity, however, at all events when the want of consideration is actively put forward as an objection (and the practice must be the same, it is conceived, when the objection is made by way of defence in an action for specific performance), to admit evidence of an agreement under seal being in fact founded on good consideration, where the deed expresses a nominal consideration" or no consideration at all," though (save in a case of fraud or illegality) a consideration actually inconsistent with that expressed in the deed could probably not be shown.¹⁰

Closely connected with this in principle is the rule of equity that, although no consideration is required for the validity of a complete declaration of trust,¹¹ or a complete transfer of any legal or equitable interest in property, yet an incomplete voluntary gift creates no right which can be enforced. Thus a voluntary parol gift of an equitable mortgagee's security is not enforceable; and, since his interest in the deeds deposited with him, where the mortgage is by deposit, is merely incidental to his security, delivery of such deeds by the mortgagee to his donee makes no difference, and does not entitle the donee to retain them against the mortgagee's representatives.¹² Certain modern decisions have indeed shown a tendency to infringe on this rule by construing the circumstances of an incomplete act of bounty into a declaration of trust, notwithstanding that the real intention of the donor was evidently not to make himself a trustee, but to divest himself of all interest.¹³ But these have been disapproved in later judgments which seem entitled to more weight.¹⁴

¹⁰ *Lefchild's case* (1865) L. R. 1 Eq. 231.

¹¹ *Llanelli Ry. and Dock Co. v. L. & N. W. Ry. Co.* (1873) L. R. 8 Ch. 942.

¹² *Qu. whether this was originally right on principle.*

¹³ *Shillito v. Hobson* (1885) 30 Ch. Div. 396, 55 L. J. Ch. 741. The delivery over seems to be a wholly unauthorised act determining the bailment at common law, and therefore a trespass against the depositor.

¹⁴ *Richardson v. Richardson* (1867) L. R. 3 Eq. 386; 36 L. J. Ch. 653; *Morgan v. Malleon* (1870) L. R. 10 Eq. 475; 39 L. J. Ch. 680.

¹⁵ *Warriner v. Rogers* (1873) L. R. 16 Eq. 340; 42 L. J. Ch. 581; *Richards v. Delbridge* (1874) L. R. 18 Eq. 11, 43 L. J. Ch. 459; *Moore v. Moore* (1874) L. R. 18 Eq. 474; 43 L. J. Ch. 617; *Hearley v. Nicholson* (1874) L. R. 19 Eq. 233; 44 L. J. Ch. 277. *Cp. Breton v. Woolten* (1881) 17 Ch. D. at 420, 50 L. J. Ch. 369.

5

PERSONS AFFECTED BY CONTRACT

GENERAL RULES AS TO PARTIES

THE original and simplest type of contract is an agreement creating an obligation between certain persons. Those persons are ascertained by their description as individuals, and not by their satisfying any general class description — or, more shortly, they are denoted by proper names and not by class names,¹ and the persons who become parties in the obligation created by the agreement are the persons who actually conclude the agreement in the first instance, and those only. The promisee looks to the promisor for satisfaction and to him alone. It is true to this day in England as a general rule that no one can be party to a contract who does not in some way stand in the place of an original party. Succession upon death is the oldest and most familiar of such ways, but even the executor's place in the Common Law was an after-thought. The law merchant was the next great innovator, making commercial debt and credit instruments of currency. Then, in a quite different region, we find contractual rights of action attached or attachable to estates and interests in land under certain conditions. The object of this chapter is to exhibit the nature and connexion of these developments.

The ideal strictness of ancient contract law (we call it ideal because there is no proof that it was ever realized in an unqualified form) may be stated thus:

The legal effects of a contract are confined to the contracting parties.

Before going into the modern departures from it in detail it may be useful to show their nature in the shape of general rules, and for that purpose it will be convenient to use certain terms in extended or special senses.

A contract creates an obligation between the contracting parties, consisting of duties on the one part and the right to demand the performance of them on the other.

Any party to a contract, so far as he becomes entitled to have anything performed under the contract, is called the creditor. So far as he becomes bound to perform anything under the contract he is called the debtor.

Representation, representatives mean respectively succession and the person or persons succeeding to the general rights and liabilities of any person in respect of contracts, whether by reason

¹ Savigny, *Obl.* § 53 (2. 16), cp. on the subject of this chapter generally *ib.* §§ 53—70, pp. 17—186.

of the death of that person or otherwise. A *third person* means any person other than one of the parties to the contract or his representatives.

RULES

1. The original parties to a contract must be persons ascertained at the time when the contract is made.

2. The creditor can demand performance from the debtor or his representatives. He cannot demand nor can the debtor require him to accept performance from any third person, but the debtor or his representatives may perform the duty by an agent.

3. A third person cannot become entitled by the contract itself to demand the performance of any duty under the contract.

4. Persons other than the creditor may become entitled by representation or by assignment if nothing remains to be done by the assignor under the contract, to stand in the creditor's place and to exercise his rights under the contract.

Explanation 1. Title by assignment is not complete, is against the debtor without notice to the debtor, and a debtor who performs his contract to the original creditor without notice of any assignment by the creditor is thereby discharged.

Explanation 2. The debtor is entitled as against the representatives, and, unless a contrary intention appears by the original contract, as against the assignees of the creditor to the benefit of any defence which he might have had against the creditor himself.

The following exceptions given here in order to complete the general statement are connected in principle with the cases of a contract for personal service or the exercise of personal skill becoming impossible of performance by inevitable accident, of which we speak in Chapter VII.

Exception 1. If it appears to have been the intention of the parties that the debtor should perform any duty in person, he cannot perform it by an agent, nor can performance of it be required from his representatives. Such an intention is presumed in the case of any duty which involves personal confidence between the parties, or the exercise of the debtor's personal skill.

Exception 2. If it appears to have been the intention of the parties that only the creditor in person should be entitled to have any duty performed, no one can become entitled by representation or assignment to demand the performance of it, nor can such performance be required from the debtor's representatives.

Such an intention is presumed if the nature of the transaction involves personal confidence between the parties, or is otherwise

* Contracts for the sale of land are enforceable in equity by and against the heirs or devisees of the parties. But here the obligation is treated as attached to the particular property.

¹ As to real or apparent exceptions, see p. 163.

² See per Collins M.R. in *Tolhurst v. Associated Portland Cement Manufacturers* [1902] 2 K.B. 660, 668, 71 L.J. K.B. 940.

such that "personal considerations" are of the foundation of the contract.'

Exception 3. The representatives of a deceased person cannot sue for a breach of contract in a case where the breach of contract was in itself a merely personal injury unless special damage to the estate which they represent has resulted from the breach of contract. But where such damage has resulted the representatives may recover compensation for it, notwithstanding that the person whose estate they represent might in his lifetime have brought an action of tort for the personal injury resulting from the same act.⁶ [The Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), s. 1, provides that all causes of action subsisting against or vested in a person shall, on his death, survive against, or, as the case may be, for the benefit of his estate. The Act, does not purport to create any new cause of action where none existed before the Act. In the case of a breach of promise to marry, damages are limited to such damage, if any, to the estate of the deceased as flows from the breach of promise to marry.]

These propositions are subject to various qualifications and exceptions. Most of the exceptions are of modern origin, and we shall see that since their establishment many attempts have been made to extend them, some of which have been successful, and some have been disallowed after being accepted for a time.

We shall now go through the rules thus stated in order, pointing out under each the limits within which exceptions are admitted in the present state of the law. The decisions which limit the exceptions are (as commonly happens in our books) for the most part the chief authorities to show the existence of the rules.

Our first rule is that *the original parties to a contract must be persons ascertained at the time when the contract is made*. It is obvious that there cannot be a contract without at least one ascertained party to make it in the first instance; and it is also an elementary principle of law that a contracting party cannot bind himself by a floating obligation to a person unascertained. "A party cannot have an agreement with the whole world; he must have some person with whom the contract is made."⁷ There is no exception to this rule in such cases as those of promises or undertakings addressed to the public at large by advertisements or the like, and sales by auction. For, as we have already seen, the con-

⁶ Cp. Indian Contract Act, ss. 37, 40. See *Stevens v. Beuning* (1854) 1 K. & J. 168, 24 L. J. Ch. 153; 100 R. R. 90, *Farrar v. Wilson* 1869 L. R. 4 C. P. 744, 746, 38 L. J. C. P. 326; *Robinson v. Dawson* 1871 L. R. 6 Ex. 264, 40 L. J. Ex. 172; *Finlay v. Churney* (1888) 20 Q. B. Div. 494; 57 L. J. Q. B. 247, *Robson v. Drummond* (1831) 2 B. & Ad. 903; 36 R. R. 560; but this case goes very far; *British Waggon Co. v. Lea & Co.* (1880) 5 Q. B. D. 149, 152, 49 L. J. Q. B. 321, and will not be extended; *Phillips v. Hull Alhambra Palace Co.* [1901] 1 Q. B. 59; 70 L. J. Q. B. 26.

⁷ See 1 Wm. Exors. 12th ed. 500, and *Bradshaw v. Lancashire & Yorkshire Ry. Co.* (1875) L. R. 10 C. P. 189; 44 L. J. C. P. 148 (since questioned in *Leggott v. G. A. Ry. Co.* (1876) 1 Q. B. D. 599; 45 L. J. Q. B. 557).

⁸ *Squire v. Whitton* (1848) 1 H. L. C. 333, 358.

tract formed in any such case in formed between two ascertained persons by one of them accepting a proposal made to him by the other, though possibly made to him in common with all other persons to whose knowledge it may come.

EFFECTS OF CONTRACT AS TO THIRD PERSONS⁷⁴

The affirmative part of our second rule, namely: *The creditor can demand performance from the debtor or his representatives*, is now and long has been, though it was not always, elementary.*

The negative part of it states that *the creditor cannot demand, nor can the debtor require him to accept, performance from any third person*. This is subject to the explanation that the debtor or his representatives may perform the duty by an agent (modified by the exception of strictly personal contracts as mentioned at the end of the rules, on this we need not dwell at present). Moreover, parties may agree as part of their contract that performance by a named or ascertainable person shall be accepted, in the case of a money payment, that the receipt of such a person, or any one of a class of ascertainable persons shall be a sufficient discharge.⁷⁵

It is obvious on principle that it is not competent to contracting parties to impose liabilities on other persons without their consent.

Every person not subject to any legal incapacity may dispose freely of his actions and property within the limits allowed by the general law. Liability on a contract consists in further limitation of this disposing power by a voluntary act of the party which places some definite portion of that power at the command of the other

⁷⁴ [See Finlay, *Contracts for the Benefit of Third Persons*, 1939.]

⁷⁵ As to the liability of personal representatives on the contracts of the testator or intestate, see 1 Wms. Saund 231-2. The old rule that an action of *debt* on simple contract would not lie against executors where the testator could have waged his law (though it is said the objection could be taken only by demurrer seems to have been in truth an innovation. See the form of writ for or against executors, Fleta i. 2, c. 62, § 9, and cp. I. N. B. 119 M, 121 O (the latter passage is curious: if a man has entered into religion his executors shall be sued for his debt, not the abbot who accepted him into religion: see Y. B. (Rolls Series) 30 Ed. I 238). It is said, however, that "Quia executores non possunt facere legem pro defuncto, petens probavit talliam suam, vel si habeat sectam: secta debet examinari: et hoc est verum sive sit mercator sive non". Y. B. (Rolls Series) 22 Ed. I 457). For the conflict of opinion as to the remedy by *assumpsit*, see Reeves, 3 403, Y. B. Mich. 2 H. VIII 11 pl. 3, the strange dictum *contra* Fitzherbert, Trin. 27 H. VIII 23, pl. 21, who said there was no remedy at all (apparently on the ground that a cause of action in *assumpsit* was for a tort and therefore died with the defendant's person), and *Norwood v. Read* (1557-8) in B. R. Plow. 180. In *Punchon's case* (1612) in Ex. Ch. 9 Co. Rep. 86 b, this dictum was overruled, authorities reviewed and explained, and the common law settled in substance as it now is.

⁷⁶ In fact there is a common proviso in policies of life insurance for small sums that not only the receipt of the insured's legal representatives, but that of any one of a described class covering in effect all his or her relatives, shall discharge the insurer. There is no objection to this, but if there is a legal representative, and the insurer knows it, probably it is not safe to pay to any other person without the representative's assent: *O'Reilly v. Prudential Assurance Co.* [1934] Ch. 519, 103 L. J. Ch. 323, C. A.

party to the contract. So much of the debtor's individual freedom is taken from him and made over to the creditor.¹⁰ When there is an obligation independent of contract, a similar result is produced without regard to the will of the party; the liability is annexed by law to some wrongful act or default in the case of tort, and in the case of contracts "implied in law" to another class of events which may be roughly described as involving the accession of benefit through the involuntary loss of another person; but, when an obligation is founded upon a real contract, the assent of a person to be bound is at the root of the matter and is indispensable.¹¹

The ordinary doctrines of agency form no real exception to this. For a contract made by an agent can bind the principal only by force of a previous authority or subsequent ratification; and that authority or ratification is nothing else than the assent of the principal to be bound, and the contract which binds him is his own contract. Under certain conditions there may be a contract binding on the agent also, as we have seen in Chap. II., but with that we are not here concerned. Another less simple apparent exception occurs in the cases in which companies have been held bound by agreements or representations¹² made by their promoters before the companies had any legal existence. These cases, however, proceed partly on the ground of a distinct obligation having either been imposed on the company in its original constitution, or assumed by it after its formation,¹³ partly on a ground independent of contract and analogous to estoppel, namely, that when any person has on certain terms assisted or abstained from hindering the promoters of a company in obtaining the constitution and the powers sought by them, the company when constituted must not exercise its powers to the prejudice of that person and in violation of those terms. The doctrine as now established probably goes as far as this, but certainly no farther.¹⁴

In one case of a suit in equity for specific performance of an award a third person interested in the subject-matter was made a party, and was held to be bound by the award, though he had not been a party to the reference and had in no way assented to it, but

¹⁰ Cp. Savigny, *Obl.* § 2. This is no less true when the parties are sovereign States: the International Postal Union is a striking example; but it is a truth constantly neglected by publicists and journalists.

¹¹ It is now settled law that a stranger may be liable in tort for procuring the breach of a contract: *National Phonograph Co. v. Edison-Bell Co.* [1908] 1 Ch. 335; 77 L. J. Ch. 218, C. A. But this is not an obligation under the contract, any more than when A. sells his land to B. the duty of all men to respect the rights of B. instead of A., as owner of that land, is a duty under the contract of sale or the conveyance.

¹² *Re Metrop. Coal Consumers' Association, Karberg's case* [1892] 3 Ch. 1; 61 L. J. Ch. 741, C. A.

¹³ *Lindley on Companies*, [6th ed. (1902) 232. [Pollock's references were to an even earlier edition. For a later collection of cases, see 5 Halsbury, *Laws of England* (2nd ed.), § 691].

¹⁴ *Lindley on Companies*, [6th ed. (1902) 237]. As to ratification by companies, see p. 88.

simply knew of it and remained passive.¹² But it has been held by higher authority¹³ that in a suit for the specific performance of a contract third persons claiming an interest in the subject-matter are not even proper parties: and even without this it seems obvious that A. and B. have no business to submit C.'s rights to the arbitration of D. It is apprehended accordingly that this exception may be treated as non-existent.

Another branch of the same general doctrine is that the debtor cannot be allowed to substitute another person's liability for his own without the creditor's assent. A contract cannot be made except with the person with whom one intends to contract.¹⁴ When a creditor assents at the debtor's request to accept another person as his debtor in the place of the first, this is called a novation. Whether there has been a novation in any particular case is a question of fact, but assent to a novation is not to be inferred from conduct unless there has been a distinct and unambiguous request.¹⁵ Such questions are especially important in ascertaining who is liable for the partnership debts of a firm when there has been a change in the members of the firm, or on contracts made in a business which had been handed over by one firm (whether carried on by a single person, a partnership, or a company) to another. A series of cases which were, or were supposed to be, of this kind arose about 1875 out of successive amalgamations of life insurance companies.¹⁶

The question may be resolved into two parts: Did the new firm assume the debts and liabilities of the old? and did the creditor, knowing this, consent to accept the liability of the new firm and discharge the original debtor?¹⁷ It would be beyond our scope to enter at large on this subject.¹⁸

There exist, however, exceptions to the general rule. In certain cases a new liability may without novation be created in substitution for or in addition to an existing liability, but where the possibility exists of such an exceptional transfer of liabilities it is

¹² *Gorell v. Richmond* (1834) 7 Sim. 1; 40 R. R. 56, doubted in *Mata v. L. C. & D. Ry. Co.* (1866) L. R. 1 Ch. 501, 507; 35 L. J. Ch. 795. In *Taylor v. Parry* (1840) 1 Man. & Gr. 604, the Court relied on positive acts of the parties as showing that they adopted the reference and were substantially parties to it.

¹³ *Tasker v. Small* (1837) 3 My. & Cr. 63; 45 R. R. 212, followed in *De Highton v. Mone*, (1866) L. R. 2 Ch. 164.

¹⁴ *Robson v. Drummond* (1831) 2 B. & Ad. 303; 36 R. R. 569, see note ⁸, p. 157. Other cases bearing on the same point are considered for another purpose in Chap. IX. [Whether it is permissible for A to delegate to a sub-contractor for the performance of A's contract with B is a question to be decided by the circumstances of each case, including of course the true construction of the contract; *Davies v. Collins* [1945] 1 All E. R. 247, 249.]

¹⁵ *Conquest's case* (1875) 1 Ch. Div. 334, 341; 45 L. J. Ch. 336.

¹⁶ It is doubtful whether some of these were really cases of novation: see *Hort's case*, and *Green's case* (1875) 1 Ch. D. 307, 322; 45 L. J. Ch. 321.

¹⁷ See *Rolfe v. Flower* (1865) L. R. 1 C. P. 27, 44; 35 L. J. P. C. 13.

¹⁸ See Lindley on Partnership (10th ed. 1935), 303 *seq.*, and as to the general principle of novation, see *Wilson v. Lloyd* (1879) L. R. 16 Eq. 60, 74; 42 L. J. Ch. 559; for a later instance of true novation, *Miller's case* (1876) 3 Ch. Div. 391. There appears to be no later authority than *Perry v. National Prov. Bank of England* [1910] 1 Ch. 464.

bound up with the correlated possibility of an exceptional transfer of rights, and cannot be considered alone. For this reason the exceptions in question will come naturally to our notice under Rule 4. when we deal with the peculiar modes in which rights arising out of certain classes of contracts are transferred.

Apart from novation in the proper sense, the creditor may bind himself once for all by the original contract to accept a substituted liability at the debtor's option. Such an arrangement is in the nature of things unlikely to occur in the ordinary dealings of private persons among themselves. But where the deed of settlement of an insurance company contained a power to transfer the business and liabilities to another company, a transfer made under this power was binding on the policy-holders and they had no claim against the original company.²⁴ In the case of a policy-holder there is indeed no subsisting debt,²⁵ but he is a creditor in the wider sense above defined.

RULE 3. — *A third person cannot become entitled by the contract itself to demand the performance of any duty under the contract*

Before we consider the possibility of creating arbitrary exceptions to this rule in any particular cases, there are some extensive classes of contracts and transactions analogous to contract which call for attention as offering real or apparent anomalies.

A. Contracts made by agents. Here the exception is only apparent. The principal acquires rights under a contract which he did not make in person. But the agent is only his instrument to make the contract within the limits of the authority given to him, however extensive that authority may be: and from the beginning to the end of the transaction the real contracting party is the principal.

Consider the following series of steps from mere service to full discretionary powers:

1. A messenger is charged to convey a proposal, or the acceptance or refusal of one, to a specified person.
2. He is authorized to vary the terms of the proposal, or to endeavour to obtain a variation on the other party's proposal (i.e., to make the best bargain he can with the particular person), within certain limits.
3. He is not confined to one person, but is authorized to conclude the contract with any one of several specified persons, or generally with any one from whom he can get the best terms.
4. He is not confined to one particular contract, but is authorized generally to make such contracts in a specified line of business or for specified purposes as he may judge best for the principal's interest.²⁶

²⁴ *Hort's case and Grain's case* (1875) 1 Ch. D. 307; 45 L. J. Ch. 321; *Harman's case* (1875) 1 Ch. Div. 326; 45 L. J. Ch. 332; *Cocker's case* (1876) 3 Ch. Div. 1; 45 L. J. Ch. 88a.

²⁵ Cp. Savigny, *Obl.* 2. 57—60.

The fact that in many cases an agent contracts for himself as well as for his principal, and the modifications which are introduced into the relations between the principal and the other party according as the agent is or is not known to be an agent at the time when the contract is made, do not prevent the acts of the agent within his authority from being for the purposes of the contract the acts of the principal, or the principal from being the real contracting party. Again when the agent is also a contracting party there are two alternative contracts with the agent and with the principal respectively.

As for the subsequent ratification of unauthorized acts there is no difference for our present purpose between a contract made with authority and one made without authority and subsequently ratified. The consent of the principal is referred back to the date of the original act by a beneficent and necessary fiction.

B. There are certain relations created by contract of which that of creditor-principal debtor and surety may be taken as the type, in which the rights or duties of one party may be varied by a new contract between others. But when a surety is discharged by dealings between the creditor and the principal debtor this is the result of a condition annexed by law to the surety's original contract. There is accordingly no real anomaly nor indeed is there even any verbal inconsistency with any of the definite rules we have stated. These cases are mentioned only because they have been considered as real exceptions by writers of recognized authority.

Insolvency and bankruptcy again have various consequences which affect the rights of parties to contracts but which the general principles of contract are inadequate to explain. We allude to them in this place only to observe that it is best to regard them not as derived from or incidental to contract but as results of an overriding necessity and beyond the region of contract altogether.² Even those transactions in bankruptcy and insolvency which have some resemblance to contracts such as statutory compositions with creditors are really of a judicial or quasi-judicial character. It is obvious that if these transactions were merely contracts no dissenting creditor could be bound.

C. Trusts are sometimes regarded as deriving their origin from a contract between the author of the trust and the trustee. This point of view may for some purposes be useful. The Scottish institutional writers (who follow the Roman arrangement in the learning of Obligations as elsewhere) consider trust as a species of real contract coming under the head of deposition.³ Conversely

² See Pothier, *Obl.* § 89.

^{2b} A striking instance is furnished by the rule in *Waring's case* (1815) 19 Ves. 345, 13 R. R. 217, see per Lord Cairns, *Banner v. Johnston* (1871) 1 R. 5 H. L. at 174, 40 L. J. Ch. 730.

³ See, though no such abstract term is known in Roman law. See Erskine, *Inst. Bk.* 3, Tit. 1 § 32.

deposits, bailments, and the contract implied by law, which is the foundation of the action for money received, are spoken of in English books as analogous to trusts."

It is certain that by the creation of a trust duties are often imposed on and undertaken by the trustee which persons not parties to the transaction, or even not in existence at its date, may afterwards enforce. And the relation of a trustee to his *cestui que trust* is in some ways analogous to that of a debtor to his creditor. Thus the transfer of equitable rights of any kind is subject, as regards the perfection of the transferee's title, to precisely the same conditions as the transfer of rights under a contract. And the true way to understand the nature and incidents of equitable ownership is to start with the notion not of a real ownership which is protected only in a court of equity, but of an obligation of the legal owner which (in the case of trusts properly so called) cannot be enforced at all, or (in the case of constructive trusts, such as that which arises on a contract for the sale of land) cannot be enforced completely, except in a court of equity.²⁸

However, although every trust may be said in this sense to include a contract, it includes so much more, and the purposes for which the machinery of trusts is employed are of so different a kind, that trusts are distinct in a marked way not merely from every other species of contract, but from all contracts as a genus. The complex relations involved in a trust cannot be reduced to the ordinary elements of contract. Trust, in fact, is a legal category *sui generis* and found only in English-speaking communities or under the influence of English law.²⁹

D. Closely connected with the cases covered by the doctrine of trusts, but extended beyond them, we have the rules of equity by which special favour is extended to provisions made by parents for their children. In the ordinary case of a marriage settlement the children of the contemplated marriage itself are said to be "within the consideration of marriage"³⁰ and may enforce any covenant for their benefit contained in the settlement.³¹

²⁸ Blackstone, *Comm.* iii, 432.

²⁹ See per Lord Westbury, *Knox v. Gye* (1871-2) L. R. 5 H. L. at 675; 42 L. J. Ch. 234, *Shaw v. Foster* (1872) L. R. 5 H. L. at 338 (Lord Cairns) and at 350 (Lord Hatherley); 42 L. J. Ch. 49.

³⁰ See F. W. Maitland's full exposition, *Collected Papers*, Camb. 1911, iii, 321. There is no connection with the Roman *fideicommissum*.

³¹ It is even said that consideration moves, or is assumed to move, from them. But it must not be inferred from this that equity regards "la peine de naître" as a legal detriment.

³² Where a settlement made on the marriage of a widow provides for her children by a former marriage, such children, though in the technical language of equity *volunteers*, or persons having no part in the consideration, have been held entitled to enforce the provisions for their benefit; but this extension has been doubted in the Court of Appeal: *Gale v. Gale* (1877) 6 Ch. D. 144, 152; 46 L. J. Ch. 809, criticized per Lindley L. J. *A.-G. v. Jacobs Smith* [1895] 2 Q. B. 341, 349; and see *Re Cameron and Wells* (1887) 37 Ch. D. 32; 57 L. J. Ch. 69. The question how far limitations in a marriage settlement to persons other than children can be supported by the consideration of marriage, so as not to be defeasible under 27 Eliz. c. 4, against subsequent purchasers, is a distinct and wider one, not falling within the scope of the present work. See *Gale v. Gale* for references to the authorities.

Such rules, however, are in truth remote from the proper field of contract law, they are incidental to dispositions of property. Apart from those dispositions "the Court will not enforce a contract as distinguished from a trust at the instance of persons not parties to the contract."

F. There is also a class of statutory exceptions (though of decreasing importance) in cases where companies and public bodies, though not incorporated, are empowered to sue and be sued by their public officers or trustees.

Such provisions are not real exceptions to the principle, for they do not in substance introduce third parties but only enable the parties concerned to act in one name instead of many."

By the Real Property Act 1845 (8 & 9 Vict. c. 106), s. 5, a person not a party to an indenture was enabled to take the benefit of a covenant in it relating to real property. This was repealed and in substance re-enacted by the Law of Property Act 1925 (15 & 16 Geo. 5. c. 20) s. 76 and its effect enlarged to cover all property (land and other property).¹²

Having disposed of these exceptions, whether real or apparent, we proceed to examine the rule in its ordinary application which may be expressed thus:—The agreement of contracting parties cannot confer on a third person any right to enforce the contract.

There are two different classes of cases in which it may seem desirable—and in which accordingly it has been attempted to effect this:—(1) where the object of the contract is the benefit of a third person; (2) where the parties are numerous and the persons really interested are liable to be changed from time to time.

It was for a long time not clear whether a contract between A and B that one of them should do something for the benefit

¹² Cotton I. J. in *Re D. Ingham* 1880, 1 Ch. Div. at 242, referring to *Oliver v. Mulvane* 1836, 2 Keen 81, 44 R. R. 191 [*Re Kay's Settlement* [1939] Ch. 329, 341, 106 L. J. Ch. 156].

¹³ See like provisions in Friendly Societies Act 1875, 38 & 39 Vict. c. 60, s. 21 (since repealed and now embodied in the Friendly Societies Act, 1886, 50 & 60 Vict. c. 25, s. 14). Trade Union Act 1871, 34 & 35 Vict. c. 31, s. 9. It is the same with building societies formed before the Act of 1874 and not incorporated under it. A statute enabling a local authority to recover expenses and not specifying any remedy has been held to make the local authority a quasi-corporation for the purpose of suing *Mill v. Scott* (1873) 1 R. B. Q. B. 406, 42 L. J. Q. B. 234. And the grant of a right by the Crown to a class of persons may have the effect of incorporating them to enable them to exercise the right. *Willingale v. Mastland* (1866) L. R. 3 Eq. 103, 36 L. J. Ch. 64, explained by Jessel M. R. in *Chilton v. Corporation of London* 1878, 7 Ch. D. at 741, 47 L. J. Ch. 433.

¹⁴ [Decisions on the statutes are *Kelsey v. Dodd* (1881) 52 L. J. Ch. 34, *Dyson v. Forster* [1909] A. C. 98, *Westhoughton U.D.C. v. Wigan Colliery Co. Ltd.* [1919] 1 Ch. 159, 88 L. J. Ch. 60, *Grant v. Edmundson* [1931] 1 Ch. 1, 100 L. J. Ch. 1, *Re Ecclesiastical Commissioners* [1936] Ch. 430, 105 L. J. Ch. 68, *White v. Bijou Mansions, Ltd.* [1938] Ch. 351, 107 L. J. Ch. 52, *Zetland v. Driver* [1937] Ch. 651 (reversed [1939] Ch. 1, 107 L. J. Ch. 316 on grounds not involving the statute), *Re Smelaw* [1938] Ch. 799, 107 L. J. Ch. 405, *Re Foster* [1938] 3 All E. R. 357, 610]. For an example of the inconvenience provided against by the section, see *Lord Southampton v. Brown* (1827) 6 B. & C. 718, 30 R. R. 511, where the person who was really interested in the payment of rent on a demise made by trustees and with whom jointly with the trustees the covenant for payment of rent was expressed to be made, was held incapable of joining in an action on the covenant.

of C. did or did not give C a right of action on the contract.⁷² And there was positive authority that at all events a contract made for the benefit of a person nearly related to one or both of the contracting parties might be enforced by that person.⁷³ However, the rule is now settled that a third person cannot sue on a contract made by others for his benefit even if the contracting parties have agreed that he may, and also that near relationship makes no difference as regards any common law right of action. Apparent exceptions (of which more presently) are due to the creation of interests in property by way of trust. The final decision was in *Tweddle v Atkinson*.⁷⁴ The following written agreement had been entered into

"Memorandum of an agreement made this day between William Guy, &c of the one part and John Tweddle of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of £200 to William Tweddle his son-in-law railway inspector, residing in Thornton in the county of Fife in Scotland and the said John Tweddle father to the aforesaid William Tweddle shall and will pay the sum of £100 to the said William Tweddle each and severally the said sums on or before the 21st day of August 1855 and it is hereby further agreed by the aforesaid William Guy and the said John Tweddle, that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified."

William Tweddle the son of John Tweddle brought an action against the executor of William Guy on this agreement the declaration averring his relationship to the parties and their intention to carry out a verbal agreement made before the plaintiff's marriage to provide a marriage portion. The action was held not to be maintainable. The Court did not in terms overrule the older cases to the contrary considering that their authority was already sufficiently disposed of by the effect of modern decisions and practice.⁷⁵

⁷² See *Winter v. Assumpsit* 1 L. R. 333, 7 per Lyne C. J. C. of *Felmakers v. Davies* (1797) 1 Bos. & P. 98 note to *Piggott v. Thompson* (1802) 3 Bos. & P. 149.

⁷³ *Dutton v. Poole* (1877) Ex. Ch. 2 L. R. 213. Vent. 318, 322. Approved by Lord Mansfield (Comp. 443). There appears to have been much difference of opinion at the time.

⁷⁴ *Harmer v. Armstrong* [1914] 1 Ch. 65, 86, 105, 111 J. Ch. 1 per Lawrence L. J. citing Lord Haldane in *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.* [1915] A. C. 847, 853, 84 L. J. K. B. 1680 and Lord Wright in *Landis v. Preferred Accident Ins. Corp. of New York* [1933] A. C. 70, 79, 102 L. J. C. P. 21. See also *Gandy v. Gandy* (1885) 30 Ch. Div. 57, 58 L. J. Ch. 1154. [But note the remarks on *Gandy v. Gandy* in *Hyman v. Hyman* [1929] A. C. 601, 98 L. J. P. 81.]

⁷⁵ (1861) 1 B. & S. 303, 30 L. J. Q. B. 265, 124 R. R. 610. It would seem that if the plaintiff had sued in John Tweddle's name the defendant would have been stopped from disputing his authority.

⁷⁶ [30 L. J. Q. B. at 266.]

⁷⁷ See also *Prue v. Easton* (1833) 4 B. & Ad. 433. Much less can a stranger to a contract who has suffered damage by the non-performance of it sue the defaulting party as on the contract. *Playford v. United Kingdom Electric Telegraph Co.* (1869) L. R. 4 Q. B. 706, 38 L. J. Q. B. 249, *Dickson v. Reuter & Telegram Co.* (1877) 2 C. P. D. 62, in C. A. 3 C. P. Div. 1, 47 L. J. C. P. 1. It is a distinct question whether these decisions rightly denied that there was any cause of action at all. See Pollock *Law of Torts*, 14th ed. 441-445.

The doctrines of equity (if and so far as they may still have to be considered apart) are at first sight not so free from doubt. There is clear and distinct authority for these propositions: When two persons, for valuable consideration as between themselves, contract to do some act for the benefit of another person not a party to the contract—

(i) That person cannot enforce the contract against either of the contracting parties.⁴¹ Exceptions are only apparent (pp. 161 *seq.*)

(ii) But either contracting party may enforce it against the other although the person to be benefited had nothing to do with the consideration.⁴²

On the other hand the case of *Gregory v. Williams*⁴³ shows that a third person for whose benefit a contract is made may sometimes join as co-plaintiff with one of the actual contracting parties against the other and insist on the arrangement being completely carried out. The facts of that case so far as now material may be stated as follows: Parker was indebted to Williams and also to Gregory, Williams being informed by Parker that the debt to Gregory was about 900*l.* and that there were no other debts, undertook to satisfy the debt to Gregory on having an assignment of certain property of Parker's. Gregory was not a party to this arrangement, nor was it communicated to him at the time. The property having been assigned to Williams accordingly the Court held that Gregory, suing jointly with Parker, was entitled to call upon Williams to satisfy his debt to the extent of 900*l.* (but not farther although the debt was in fact greater) out of the proceeds of the property. It was not at all suggested that he could have sued alone in equity more than at law,⁴⁴ and the true view of the case appears to be that the transactions between Williams and Parker amounted to a declaration of trust of the property assigned for the satisfaction of Gregory's claim to the specified extent.⁴⁵ Another seeming exception occurs in *Page v. Cox*,⁴⁶ where it was held that a provision in partnership articles that a partner's widow should be entitled to his share of the business might be enforced by the widow. But the decision was carefully put on the ground that the provision in the articles created a valid trust of the partnership property in the hands of the surviving partner. The result is that there is no real and allowed authority for holding that rights can

⁴¹ *Colyear v. Mulgrave* 1536 2 Keen 81, 44 R. R. 191.

⁴² *Davenport v. Bushopp* 1843 2 Y. & C. 451 460. 1 Ph. 698. 704.

⁴³ 1817 3 Mer. 582, 17 R. R. 136.

⁴⁴ For an attempt of a third person to sue at law under very similar circumstances, see *Price v. Easton* 1833 4 B. & Ad. 433, showing clearly that A. cannot sue on a promise by B. to C. to pay C.'s debt to A. [It is now settled practice that if the trustee refuses to sue the beneficiary is entitled to sue in his own name, making the trustee defendant. *Toulmin J. in Royal Exchange Assurance v. Hope* [1928] 1 Ch. 179, 185, 97 L. J. Ch. 153.]

⁴⁵ *Empress Engineering Co. v. [?]* 1880 16 Ch. Div. 125, 129, 130, by Jessel M.R. and James L.J.

⁴⁶ (1851) 10 Ha. 103, cp. *Murray v. Flavell* 1883) 25 Ch. Div. 89, 53 L. J. Ch. 185.

in general be acquired by third parties under a contract, unless by the creation of a trust.⁶⁷

The general principle has been re-affirmed in our own time. "A mere agreement between A. and B. that B. shall pay C. (an agreement to which C. is not a party either directly or indirectly) will not prevent A. and B. from coming to an agreement the next day releasing the old one."⁶⁸

"An agreement between A. and B. that B. shall pay C. gives C. no right of action against B."⁶⁹

[The author seems to have ignored a strong attack upon the doctrine that there is a sharp distinction between cases in which it has been held that X. cannot sue Y. for a benefit which Y. has contracted with Z. that Y. will confer upon X., X. being no party to the contract and cases in which it has been held that X. can sue Y. for that benefit if the contract between Y. and Z. creates a trust in X.'s favour. The leader of this attack contends that the English decisions "show that the device of a trust can be made equally successful by fiction in cases where the contracting parties do not expressly adopt it, use no such words as trust and trustee, and are not even conscious of the existence of such concepts."⁷⁰ It must be confessed that some of the English decisions raise the inference that if the Courts wish to enable X. to sue, they make Y. a trustee, but that if they wish to prevent him from doing so they fall back upon the dogma that there is no privity of contract between X. and Y. Some of the cases may be explicable on the ground that they are implicated with special kinds of contracts; e.g., charterparties, but others do not depend upon any such peculiarity.]

⁶⁷ In *Les Affréteurs Reunis v. Leopold Walford, Ltd.* [1919] A. C. 801; 88 L. J. K. B. 861 the charterers were by consent treated as suing as trustees for the brokers.

⁶⁸ [Jessel M.R. *Empress Engineering Co.*, 10 Ch. Div. 125, 129.]

⁶⁹ Lindley L.J. *Re Rotherham Alum and Chemical Co.* (1883) 25 Ch. Div. 3111. These statements overrule what is said in *Touche v. Metrop. Railway Warehousing Co.* (1871) L.R. 6 Ch. 671, 677; 40 L.J. Ch. 396; the actual decision may be supported on the ground of trust. Compare further *Eley v. Posner, &c. Life Assurance Co.* (1876) 1 Ex. Div. 88; 45 L.J. Ex. 451 (a provision in articles of association that A. shall be solicitor to the company and transact all its legal business is as regards A. *res inter alios acta* and gives him no right against the company); *Methado v. Porto Alegre Ry. Co.* (1874) L.R. 9 C. P. 504; 43 L.J. C. P. 253. [The person referred to as "A" in the text cannot, unless the contract shows a contrary intention, require B to pay the money to him, instead of to C. *Re Stapleton-Bretherton* [1941] Ch. 481; *Re Shebman* [1943] Ch. 396.]

⁷⁰ [Prof. A. L. Corbin in 46 L. Q. R. 19, 30, 12-45, at 17; the authorities are collected and examined in the article.]

⁷¹ [Cf. *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge* [1915] A. C. 847; 84 L. J. K. B. 1680, with *Les Affréteurs, &c. v. Walford* [1919] A. C. 801; 88 L. J. K. B. 861, and the remarks on these cases by Prof. Corbin in 46 L. Q. R. 33-36, and Prof. Z. Chafetz in 41 *Harvard Law Review* (1928), 951-952.]

⁷² [*Walford's case* (last note)]; cf. *Lord Strathcona S.S. Co. v. Dominion Coal Co.* [1926] A. C. 108; 95 L.J. P. C. 71.]

⁷³ [They are cited in 46 L. Q. R. 12-45. The Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 56, sub-s. 1, provides that "a person may take an immediate or other interest in land or other property . . . although he may not be named as a party to the conveyance or other instrument." This sub-section has not the sweeping effect that might be inferred from its wording; *Re Sinclair's Life Policy* [1938] Ch. 799; *Re Foster* [1938] 3 All E. R. 357, 365.]

The whole question has been recently investigated by the Lord Chancellor's Law Revision Committee. In their Sixth Interim Report, 1937, 'they pointed out the inconvenience arising from the uncertainty whether the Courts will, in any particular case, apply the trust idea or the idea of privity of contract; the procedural difficulties where the trust idea is held to be applicable; and the special necessity of clarifying this branch of the law in the case of Bankers' Commercial Credits, which are a prominent feature in modern business particularly in foreign trade.' They recommended that where a contract by its express terms purports to confer a benefit on a third party it shall be enforceable by the third party subject to any defences that would have been valid between the contracting parties but that the parties to the contract may unless it otherwise provides cancel it at any time before the third party has adopted it 'expressly or by conduct'.⁴⁴

In India third parties from whom consideration moved have been allowed on the construction of s. 2 sub-s (d) of the Contract Act, to sue in their own names but the extent and authority of these decisions are not clear.

We now come to the class of cases in which contracting parties have attempted for their own convenience to vest the right of enforcing the contract in a third person. Except within the domain of the stricter rules applicable to parties to actions on deeds and negotiable instruments there appears to be no objection to several contracting parties agreeing that one of them shall have power to sue for the benefit of all except the party sued. Thus where partners create by agreement penalties to be paid by any partner who breaks a particular stipulation they may empower one partner alone to sue for the penalty. The application of the doctrines of agency may also lead to similar results. It seems doubtful

⁴⁴ [Cmd. 5440, p. 3-3-3.]

⁴⁵ [See Gutteridge, *Bankers' Commercial Credits* 1932, Ch. III, IV.]

⁴⁶ [It was also pointed out that the Common Law stands alone among modern legal systems in its rigid adherence to the view that a contract shall not confer any rights on a stranger to it. In America the Restatement of Contracts §§ 133, 147 mitigates the rigour of the rule. See too Prof. Z. Chafee in 41 *Harvard Law Review* (1928), 945, 1013; and Williston, *Contracts* § 113. Pollock's note on the American authorities was as follows: Harriman 212, 199. Prof. Williston in *Harv. Law Rev.* xv, 767. This article is in part embodied in an excursus to the third American edition of this book. See further Prof. Crawford D. Hering, *History of the Beneficiary's Action in Assumpsit: Essays in Anglo-American Legal History* (1909) in 339, showing that the reason for the modern English rule do not apply to the actions of debt and account which were not actions on promises at all. This, with great respect, can be of practical interest only in jurisdictions where the old forms of action are still in use.]

⁴⁷ See the Note edited by the present writer and Sir D. F. Mulla, 6th ed. 1931, 19, 25. The rule discussed in the text is of course quite independent of the doctrine of consideration.

⁴⁸ *Rodenhurst v. Bates* 1826, 3 Bing 463, 470, 28 R. R. 659. Of course they must take care to make the penalty payable not to the whole firm but to the members of the firm minus the offending partner. Whether under the present Rules of Court the other partners could use the name of the firm to sue for the penalty,

quære.

⁴⁹ *Spurr v. Cas.* 1871, 1 R. 3, Q. B. 636, 39 L. J. Q. B. 240.

whether a promise to several persons to make a payment to one of them will of itself enable that one to sue alone.⁶⁰

But it is quite clear that the most express agreement of contracting parties cannot confer any right of action on the contract on a person who is not a party. Various devices of this kind have been tried in order to evade the difficulties that stand in the way of unincorporated associations enforcing their rights, but have always failed when attention was called to them. This has happened in the case of actions brought by the chairman for the time being of the directors of a company,⁶¹ by the directors for the time being of a company⁶² by the purser for the time being of a coast boat company⁶³ and by the managers of a mutual marine insurance society.⁶⁴ It will not be necessary to dwell on any instance other than the last. In *Gray v Pearson* the reasons against allowing the right of action are well given in the judgment of Willes J. —

"I am of opinion that this action cannot be maintained, and for the simple reason — a reason not applicable merely to the procedure of this country, but one affecting all sound procedure — that the proper person to bring an action is the person whose right has been violated. Though there are certain exceptions to the general rule for instance in the case of agents, auctioneers or factors these exceptions are in truth more apparent than real. The persons who are suing here are mere agents, managers of an assurance association of which they are not members, and they are suing for premiums alleged to have become payable by the defendant in respect of policies effected by the plaintiffs for him, and for his share of contributions to losses and damages paid by them to other members of the association whose vessels have been lost or damaged. The bare statement of the facts is enough to show that the action cannot be maintained. It is in effect an attempt to substitute a person as a nominal plaintiff in lieu of the persons whose rights have been violated."

At common law the payee of a negotiable instrument must, on the same principle, be a person who can be ascertained at the time of accepting the bill or making the note. But by the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61) s. 7, a bill (and it seems

⁶⁰ *Chanter v Leese* 1839 4 M & W 295 in Ex Ch 5 M & W 608 51 R R 584 where both Courts inclined to think not but gave no decision. In *Jones v Robinson* 1847 1 Lx 454 17 L J Lx 36, an action was brought by one of two late partners against the purchaser of the business on a promise to pay the plaintiff what was due to him from the firm for advances. This was declared on as a separate promise in addition to a general promise to the two partners to pay the partnership debts and the only question was whether there was any separate consideration for the promise sued on.

⁶¹ *Hull v Bannbridge* 1840 1 Min & Gt 42.

⁶² *Phelp v Tyle* (1839) 10 A & L 113 50 R R 353.

⁶³ *Hylant v Parker* 1838 1 C B N S 200 27 L J C P 120 114 R R 675, where Willes J suggested that it was trenching on the prerogatives of the Crown to make a new species of corporation sole for the purpose of bringing actions.

⁶⁴ *Gray v Pearson* 1870 1 R C P 568 in the earlier case of *Griffith v Gibson* (1860) 1 R 2 C P 120 36 L J C P 99 a similar action succeeded the question of the manager's right to sue not being raised. In Scotland there seems to be no similar difficulty at all events where the contract is with an official representative of a foreign government see *Izquierdo v (The) Bank Engineering Co* [1902] A C 524, 71 L J C P 94.

by ss. 73 and 89 also a cheque or a promissory note) may be made payable to the holders of an office for the time being."

ASSIGNMENT OF CONTRACTS

RULE 4—We now come to the fourth rule, which we have expressed thus—

Persons other than the creditor may become entitled by representation or assignment to stand in the creditor's place and to exercise his rights under the contract

We need say nothing here about the right of personal representatives to enforce the contracts of the person they represent, except that it has been recognized from the earliest period of the history of our present system of law. "With regard to assignment, the benefit of a contract cannot be assigned (except by the Crown) at common law so as to enable the assignee to sue in his own name." The origin of the rule was attributed by Coke to the "wisdom and policy of the founders of our law" in discouraging maintenance and litigation "but it is better explained as a logical consequence of the archaic view of a contract as creating a strictly personal obligation between the creditor and the debtor." That same rule is stated by Gaius as prevailing in the Roman law. "Anyhow it has been long established that the proper course at common law is for the assignee to sue in the name of the assignor. It appears from the Year Books that attempts were sometimes made to object to actions of this kind on the ground of maintenance, but without success.

In equity the right of the assignee was pretty soon recognized and protected—that is, if the assignor refused to empower the assignee to sue in his name at law. Ordinary choses in action were not assignable at law, but were generally speaking, assignable in equity whether themselves legal or equitable choses. In the former case, equity compelled the assignor to allow his name

On the former law see *Holmes v. Jaques* 1880, 1 R. 1 Q. B. 376, 33 L. J. Q. B. 130. Subject to some technical exceptions which have now disappeared, see notes to *Wheatley v. Lane* 1667, 1 Wms. Saund. 240, 99, and for early instances of actions of debt brought by executors Y. B. 20 & 21 Ed. I. 304, 374.

¹ *Termes de la Ley* tit. Chose in Action.

² *Lampet's case* 1613, 10 Co. Rep. 48 a. For exposition of the rule in detail, see *Dicey on Parties*, 115.

³ *Spence Eq. Jurisd. of Chy.* 2, 850. An examination of the earlier authorities has been found to confirm this view. The rule is assumed as unquestionable, and there is no trace of Coke's reason for it. The objection of maintenance was set up, not against the assignee suing in his own name, which was never attempted so far as we can find, but against his suing in the name of the assignor—see Note 6 in Appendix.

⁴ *Gai.* 2, 38, 39. "Quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo quibus res corporales ad alium transferuntur, id efficere possum, sed opus est, ut iubente me tu ab eo stipuleris, quare res efficit, ut a me liberetur et incipiat tibi teneri, quare dicitur novatio obligationis. Sine hac vero novatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri." In later times the transferee of a debt was enabled to sue by *nullus actio* in his own name. This seems to have been first introduced only for the benefit of the purchaser of an inheritance—D. 2, 14 de pactis, 16 pr., C. 4, 39 de heredi vel act. vend. 1, 2, 4, 6, and afterwards extended to all cases—C. eod. tit. 7, 9. See too C. 4, 10 de obl. et act. 1, 2, C. 4, 15 quando fiscus, 7.

to be used for their recovery in legal proceedings, in the latter case the assignee could sue in equity in his own name."¹ Where the assignee had an easy remedy by suing in the name of the assignor, the Court of Chancery would not interfere.²

But equity also regarded the protection of the debtor; the modern law still does so, and therefore will not enforce an assignment by which the debtor's burden is increased³ or his remedies diminished.⁴

The Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (6), now replaced by s. 136, sub-s. 1, of the Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), created a legal right to sue in the assignee's own name, but confined to cases where the assignment is absolute—and by writing under the hand of the assignor, and express notice in writing has been given to the debtor.

There may still be more extensive equitable rights of this kind. [The Law of Property Act, 1925, s. 53, sub-s. 1 (c), which replaces the Statute of Frauds 1677 (29 Car. II. c. 3), s. 9, provides that "a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorized in writing or by will." And s. 53, sub-s. 1 (b) of the same Act (replacing the Statute of Frauds, s. 7) provides that "a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will."]

¹ *Parker v. Cole*, *v. Bromley* [1912] 1 K. B. at 480. [Consideration is not necessary for an equitable assignment. *Holt v. Heathfield Trust, Ltd.* [1942] 2 K. B. 1. In 59 L. Q. R. 381 (2), Mr. Megarry points out the confused state of the law on this topic; see, too, Mr. Holland, *ibid.* 129-133.]

² *Hammond v. Moseley*, 10 B. 1 Supp. 327, Spencer, 2 B54, Harv. Law Rev. 1, 6-7. *Talbot v. A. Ltd. Portland Cement Manufacturers* [1901] 2 K. B. 811, reversed in C. A. and H. L., see [1904] A. C. 414, 72 L. J. K. B. 834, but only on the ground that the original contract was still in force and extended to assigns. See per Lord Lindley [1904] A. C. at 422.]

³ *Keepe v. Boverton* [1900] 2 K. B. 604, 75 L. J. K. B. 873, C. A. where the assignor had turned his business into a limited company, and part of the original consideration on his side was a promise by which the company could not be bound.

⁴ *Tancred v. Delago Bay and T. Africa Ry. Co.* [1889] 23 Q. B. D. 239, 58 L. J. Q. B. 459. An absolute assignment may be subject to a trust in respect of the moneys recovered. *Infants v. Bell* [1891] 1 Q. B. 737, 60 L. J. Q. B. 556, C. A. The sub-section does not apply to an assignment of part of an entire debt; the assignee becomes only a creditor in equity as to the part assigned. *Re Steel Wing Co.* [1921] 1 Ch. 349; 90 L. J. Ch. 116; *Williams v. Atlantic Assurance Co.* [1933] 1 K. B. 81; 102 L. J. K. B. 241, C. A. See further as to what amounts to an absolute assignment, *Mercantile Bank of India v. Franco* [1890] 2 Q. B. 613; 68 L. J. Q. B. 921, C. A.; *Marchant v. Marlar, Dean & Co.* [1901] 2 K. B. 829; 70 L. J. K. B. 820; *Hughes v. Pump House Hotel Co.* [1902] 2 K. B. 190, 71 L. J. K. B. 630, C. A.; *Re Williams* [1917] 1 Ch. 1, 86 L. J. Ch. 36 C. A. (attempt to construe incomplete gift as such). The term "legal chose in action" in a corresponding Colonial Act has been held to include a cause of action for negligence: *King v. Victoria Insurance Co.* [1896] A. C. 250; 65 L. J. P. C. 38. (Farwell J. in *Manchester Brewery Co. v. Coombs* [1901] 2 Ch. 608, 619; 70 L. J. Ch. 814, adopted the general definition but said nothing of the application; and see *Defries v. Milne* [1913] 1 Ch. 98; 82 L. J. Ch. 1, C. A.) It includes a claim to compensation under s. 68 of the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18). *Dawson v. G. A. City Ry. Co.* [1905] 1 K. B. 260; 74 L. J. K. B. 190, C. A.; and the benefit of a contract for the purchase of a reversion: *Torkington v. Mager* [1902] 2 K. B. 427; 71 L. J. K. B. 712, revd. in C. A. on other grounds [1903] 1 K. B. 644; 72 L. J. K. B. 336.

It seems that to constitute an equitable assignment there must be at least an order to pay out of a specified fund."

As for the notice to the debtor, the rule of equity is that it must be expressed but need not be in writing."

There remain, therefore, a great number of cases where the right is purely equitable, although the enlarged jurisdiction of every branch of the Supreme Court makes the distinction less material than formerly. The Judicature Act does not in any way impair the efficacy of a transaction which would have been a good equitable assignment before the Act."

In ordinary cases" rights under a contract derived by assignment from the original creditor are subject as already stated, to the following limitations:—

1st. Title by assignment is not complete as against the debtor without notice to the debtor,"* and a debtor who performs his contract to the original creditor without notice of any assignment by the creditor is thereby discharged.

2nd. The debtor is entitled as against the representatives, and, unless a contrary intention appears by the original contract, as against the assignees of the creditor, to the benefit of any defence which he might have had against the creditor himself.

1. As to notice to the debtor. Notice is not necessary to complete the assignee's equitable right as against the original creditor himself, or as against his representatives, including assignees in bankruptcy:" but the claims of competing assignees or incumbancers rank as between themselves not according to the order in date of the assignments, but according to the dates at which they have respectively given notice to the debtor. This was decided by the cases of *Dearle v. Hall* and *Loveridge v. Cooper*," the principle of which was soon afterwards affirmed by the House of Lords." The same rule prevails in the modern civil law " and

* *Perical v. Dunn* (1885) 29 Ch. Div. 128; 54 L. J. Ch. 272. [Followed in *Re Gunsbourg* (1919) 88 L. J. K. B. 479.] An adventurous attempt to extend the conception of equitable assignment may be seen in *Western Wagon and Property Co. v. West* [1892] 1 Ch. 271; 61 L. J. Ch. 244.

" *Re Tuckner* (1865) 35 Beav. 317.

" *William Brandt's Sons & Co. v. Dunlop Rubber Co.* [1905] A. C. 454; 74 L. J. K. B. 898.

" It does not seem useful, at this day, to refer here to the various statutes passed in the course of the nineteenth century which made various kinds of securities and things in action specially transferable.

" [There is no legal assignment until he actually receives notice: *Holt v. Heatherfield Trust, Ltd.* [1942] 2 K. B. 1; see references, *ante* p. 171, n. 71.]

" *Burn v. Carvalho* (1839) 4 M. & Cr. 690; 48 R. R. 213.

" (1823-7) 3 Russ. 1, 38, 48; 27 R. R. 1. The application of the rule is not modified by consideration of the parties' relative merits as to diligence in particular cases: *Re Lake* [1903] 1 K. B. 151; 72 L. J. K. B. 117. Cp. (though not quite *in pari materia*) *Jared v. Clements* [1903] 1 Ch. 428; 72 L. J. Ch. 291, C. A.

" *Foster v. Cockerell* (1835) 3 Cl. & F. 456; 39 R. R. 24. It was later decided that a second assignee who takes his assignment not from the beneficiary himself, but from his legal personal representative, may equally gain priority by notice: *Freshfield's Trusts* (1879) 11 Ch. Div. 198. The rule is criticized, though allowed to be settled law, in *Ward v. Duncombe* [1893] A. C. 369, per Lord Macnaghten at 391-3, 62 L. J. Ch. 881. It will not be extended: *Hill v. Peters* [1918] 2 Ch. 273; 87 L. J. Ch. 584.

" See Pothier, *Contrat de Vente*, §§ 560, 554-599.

has been adopted from it in the Scottish law;⁴⁴ and the true reason of it, though not made very prominent in the decisions which establish the rule in England, is the protection of the debtor. He has a right to look to the person with whom he made his contract to accept performance of it, and to give him a discharge, unless and until he is distinctly informed that he is to look to some other person. According to the original strict conception of contract ("à ne considérer que la subtilité du droit" as Pothier⁴⁵ expressed it), his creditor or his creditor's assignee cannot even require him to do this, any more than in the converse but substantially different case a debtor can require his creditor to accept another person's liability, and his assent must be expressed by a novation.⁴⁶ Such was in fact the old Roman law, as is shown by the passage already cited from Gaius. By the modern practice the novation is dispensed with, and the debtor becomes bound to the assignee of whom he has notice. But he cannot be bound by any other assignment, though prior in time, of which he knows nothing. He is free if he has fulfilled his obligation to the original creditor without notice of any assignment; he is equally free if he fulfils it to the assignee of whose right he is first informed, not knowing either of any prior assignment by the original creditor or of any subsequent assignment by the new creditor.⁴⁷ It is enough for the completion of the assignee's title "if notice be given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable or is merely charged with the duty of making the payment."⁴⁸ e.g., as an agent entrusted with a particular fund. Notice not given by the assignee may be sufficient, if shown to be such as a reasonable man would act upon.⁴⁹ All this doctrine of notice has no application to interests in land: "but, subject to that exception, it applies to rights created by trust as well as to those created by contract; the beneficial interest being treated for this purpose exactly as if it were a debt due from the trustee. In the case of trusts a difficulty may arise from a change of trustees; for it may happen that a fund is transferred to a new set of trustees without any notice of an assignment which has been duly notified to their predecessors, and that notice is given to the new trustees of some other assignment. The first assignee prevails if he gave

⁴⁴ Erskine Inst. Bk. 3, Tit. 5.

⁴⁵ *Contrat de Vente*, § 551.

⁴⁶ See p. 160.

⁴⁷ See per Willes J. L. R. 5 C. P. at 594. Per Knight Bruce L. J. *Stocks v. Dobson* (1853) 4 D. M. G. 11; 102 R. R. 1, 6, 17; 22 L. J. Ch. 884. Notice after a negotiable instrument has been given by the debtor is too late even if the instrument is still held by the original creditor: *Bence v. Sharman* [1898] 2 Ch. 582; 67 L. J. Ch. 513, C. A.

⁴⁸ Per Lord Selborne C. *Addison v. Cox* (1872) L. R. 8 Ch. 76, 79; 42 L. J. Ch. 291.

⁴⁹ *Lloyd v. Banks* (1868) L. R. 3 Ch. 488.

⁵⁰ Although the exception is fully established its reasonableness is doubtful. Its effect is that equitable interests in land stand on a different footing from personal rights: see this relied on as the ground of the exception, *Jones v. Jones* (1837-38) 1 Sim. 693; 42 R. R. 249. But on the other hand their liability to be defeated by a purchase of the legal estate for value without notice shows that they fall short of real ownership.

notice to all the trustees in existence at the date of his assignment," but the new trustees cannot be made personally liable for having acted on the second assignment." If, however, only one trustee has notice of A.'s incumbrance, and dies, and after his death, another incumbrancer B. gives notice to all the then existing trustees, B. will be preferred."

The rules as to notice apply to dealings with future or contingent as well as with present and liquidated claims. "An assurance office might lend money upon a policy of insurance to a person who had insured his life, notwithstanding any previous assignment by him of the policy of which no notice had been given to them."

2. As to the debtor's rights against assignees. The rule laid down in the second explanation is often expressed in the maxim "The assignee of an equity is bound by all the equities affecting it." This, however, includes another rule founded on a distinct principle, which is that no transaction purporting to give a beneficial interest apart from legal ownership can confer on the person who takes or is intended to take such an interest any better right than belonged to the person professing to give it him. If A. contracts with B. to give B. something which he has already contracted to give C., then C.'s claim to have the thing must prevail over B.'s whether B. knew of the prior contract with C., or not. And if B. makes over his right to D., D. will have no better right than B. had." And this applies not only to absolute but to partial interests (such as equitable charges on property) to the extent to which they may affect the property dealt with. Again, by a slightly different application of the same principle, a creditor of A. who becomes entitled by operation of law to appropriate for the satisfaction of his debt any beneficial interest of A.'s (whether an equitable interest in property or a right of action) can claim nothing more than such interest as A. actually had; and he can gain no priority by notice to A.'s trustee or debtor even in cases where he might have gained it if A. had made an express and unqualified assignment to him." But we are not concerned here with the development of these doctrines, and we return to the other sense

¹¹ *Re Wardale* [1899] 1 Ch. 164, 68 L. J. Ch. 117.

¹² *Phipp v. Lucgrove* 1873 L. R. 16 Eq. 80, 42 L. J. Ch. 802; see L. R. 16 Eq. 90 as to the precautions to be taken by an assignee of an equitable interest who wishes to be perfectly safe. The death of one of two or more trustees, being the only one who has notice of an incumbrance, does not deprive that incumbrance of the priority it has gained: *Ward v. Duncombe* [1893] A. C. 369; 62 L. J. Ch. 881.

¹³ *Phillips' Trusts* [1903] 1 Ch. 183, 72 L. J. Ch. 94.

¹⁴ L. R. 16 Eq. at 88.

¹⁵ This is of course consistent with B. having his remedy in damages. Cp. pp. 24-25.

¹⁶ See *Pinkett v. Wright* (1842) 2 Ha. 120, affd. nom. *Murray v. Pinkett* (1846) 12 Cl. & F. 764; 69 R. R. 191; *Ford v. White* (1852) 16 Beav. 120, 96 R. R. 55; *Glad v. Holland* (1851) 19 Beav. 262; 105 R. R. 134.

¹⁷ *Pickering v. Iffracombe Ry. Co.* (1868) L. R. 3 C. P. 235; 37 L. J. C. P. 118, overruling virtually *Watts v. Porter* (1854) 3 E. & B. 743; 23 L. J. Q. B. 345; 97 R. R. 731; see *Crow v. Robinson*, *Robinson v. Nasbitt* (1868) L. R. 3 C. P. 264; 37 L. J. C. P. 124; judgment of Erle J. (dus.) in *Watts v. Porter*.

of the general maxim. In that sense it is used in such judicial expressions as the following:

"If there is one rule more perfectly established in a court of equity than another, it is that whoever takes an assignment of a chose in action . . . takes it subject to all the equities of the person who made the assignment."¹

"It is a rule and principle of this Court, and of every Court, I believe, that where there is a chose in action, whether it is a debt, or an obligation, or a trust fund, and it is assigned, the person who holds that debt or obligation, or has undertaken to hold the trust fund, has, as against the assignee, exactly the same equities that he would have as against the assignor."²

This is in fact the same principle which is applied by common law as well as equity jurisdictions for the protection of persons who contract with agents not known to them at the time to be agents.³ What is meant by this special use of the term "equities" will be best shown by illustration. A debt is due from B. to A., but there is also a debt due from A. to B. which B. might set off in an action by A. In this state of things A. assigns the first debt to C. without telling him of the set-off. B. is entitled to the set-off against C. Again, B. has contracted to pay a sum of money to A., but the contract is voidable on the ground of fraud or misrepresentation. A. assigns the contract to C., who does not know the circumstances that render it voidable. B. may avoid the contract as against C. Again, in a somewhat less simple case, there is a liquidated debt from B. to A. and a current account between them on which the balance is against A. A. assigns the debt to C., who knows nothing of the account. B. may set off as against C. the balance which is due on the current account when he receives notice of the assignment, but not any balance which becomes due afterwards.⁴

But it is open to the contracting parties to exclude the operation of this rule if they think fit by making it a term of the original contract that the debtor shall not set up against an assignee of the contract any counter claim which he may have against the original creditor. This is established by the decision of the Court of Appeal in Chancery in *Ex parte Asiatic Banking Corporation*, the

¹ *Lord St. Leonards, Manual v. Dixon* (1852) 3 H. L. C. 702, 731; 88 R. R. 296, 311 [Cf. the American Restatement of Contracts, § 167, which is to much the same effect.]

² *James L. J.*, sitting as V.-C. *Phipps v. Inceogre* (1873) L. R. 16 Eq. 80, 88; 42 L. J. Ch. 802.

³ See p. 84.

⁴ *Catendish v. Greaves* (1857) 24 Beav. 163, 173; 27 L. J. Ch. 314; 116 R. R. 78, where the doctrine is fully expounded. As to set-off accruing after notice of assignment, *Stephens v. Vinables* (1862) 30 Beav. 625; *Watson v. Mid Wales Ry. Co.* (1867) L. R. 2 C. P. 593; 30 L. J. C. P. 285.

⁵ *Graham v. Johnson* (1869) L. R. 8 Eq. 36; 38 L. J. Ch. 374.

⁶ *Catendish v. Greaves*, note 2. But the innocent assignee of a contract obtained by fraud cannot be held liable to the defrauded party on the footing of an action for deceit (which assumes the contract not to be rescinded): *Stoddart v. Union Trust* [1912] 1 K. B. 181; 81 L. J. K. B. 140, C. A.; see E. Lumley thereon in L. Q. R. xxvii, 184, a case much complicated by a strange course of pleading.

facts of which have already been stated for another aspect of the case.⁵

Two alternative grounds were given for the decision in favour of the claim of the Asiatic Banking Corporation under the letter of credit. One which we have already noticed, was that the letter was a general proposal, and that there was a complete contract with any one who accepted it by advancing money on the faith of it. The other was that assuming the original contract to be only with Dickson, Tatham & Co., to whom the letter was given, yet the takers of bills negotiated under the letter were assignees of the contract and it appeared to have been the intention of the original parties that the equities which might be available for the bank against Dickson, Tatham & Co. should not be available against assignees. Lord Cairns then Lord Justice thus stated the law —

Generally speaking a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities.⁶

Where assignees of a chose in action are enabled by statute to sue at law similar consequences may be produced by way of estoppel⁷ which really comes to the same thing the doctrine of estoppel being founded on the same principle.

The principle thus laid down has been followed out in several later decisions on the effect of transferable debentures issued by companies. The question whether the holder of such a debenture takes it free from equities is to be determined by the original intention of the parties.

The form of the instrument is of course material but the general tenor is to be looked to rather than the words denoting to whom payment will be made these cannot be relied on as a sole or conclusive test. Making a debenture payable to the holder or bearer does not necessarily mean more than that the issuing company will not require the holder who presents the instrument for payment to prove his title especially if the object of the debenture is on the face of it to secure a specific debt. But an antecedent agreement to give debentures in such a form is evidence that they were meant to be assignable free from equities,⁸ and debentures payable to bearer without naming any one as payee in the first instance are *prima facie* so assignable⁹ and may be negotiable¹⁰ so again if the

⁵ (1867) 1 R. 2 Ch. 391, 36 L. J. Ch. 222, pp. 17, 18.

⁶ *Webb v. Herne Bay Commissioners* (1870) 1 R. 5 Q. B. 642, 39 L. J. Q. B. 221.

⁷ *Financial Corporation's claim* (1868) 1 R. 3 Ch. 355, 36 L. J. Ch. 362.

⁸ *Ex parte New Zealand Banking Corporation* (1867) 1 R. 3 Ch. 154, 37 L. J. Ch. 418.

⁹ *Ex parte Colborne & Straubridge* (1870-1) L. R. 11 Eq. 478, 40 L. J. Ch. 93, 343.

¹⁰ *Notwithstanding Crouch v. Crédit Foncier* (1871) L. R. 8 Q. B. 374, 385, 42 L. J. Q. B. 183; see *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q. B. 658, 67 L. J. Q. B. 986, *Edelstein v. Schuler & Co.* [1902] 2 K. B. 144, 71 L. J. K. B. 572.

document resembles a negotiable instrument rather than a common money bond or debenture in its general form.¹¹

Even when there is nothing on the face of the instrument to show the special intention of the parties, the issuer cannot set up equities against the assignee if the instrument was issued for the purpose of raising money on it.¹² The general circumstances attending the original contract—e.g. the issue of a number of debentures to a creditor instead of giving a single bond or covenant for the whole amount due—may likewise be important. Moreover, apart from any contract with the original creditor, the issuing company may be estopped from setting up equities against assignees by subsequent recognition of their title.¹³

The rule extends to an order for the delivery of goods as well as to debentures or other documents of title to a debt payable in money.¹⁴

On principle this doctrine seems inapplicable in a case where the original contract is not merely subject to a cross claim but is voidable. For the agreement that the contract shall be assignable free from equities is itself part of the contract, and should thus have no greater validity than the rest. A collateral contract for a distinct consideration might be another matter: but the notion of making it a term of the contract itself that one shall not exercise any right of rescinding it that may afterwards be discovered seems to involve the same kind of fallacy as a sovereign legislature assuming to make its own acts irrevocable. Nor does it make any difference, so long as we adhere to the general rules of contract, that the stipulation is in favour, not of the original creditor, but only of his assignees.¹⁵ However, the point has not been distinctly raised in any of the decided cases. In *Graham v. Johnson*,¹⁶ where the contract was originally voidable (if not altogether void, the plaintiff had executed a bond under the impression that he was accepting or indorsing a bill of exchange),¹⁷ an assignee of the bond as well as the obligee was restrained from enforcing the bond: but the decision was rested on the somewhat unsatisfactory ground that, although the instrument was given for the purpose of money

¹¹ *Ex parte City Bank* (1868) L. R. 3 Ch. 758.

¹² *Dickson v. Swansea Vale Ry. Co.* (1868) L. R. 4 Q. B. 44; 38 L. J. Q. B. 17; *Graham v. Johnson* (1869) L. R. 8 Eq. 36; 38 L. J. Ch. 374, seems not consistent with this.

¹³ *Higgs v. Northern Assam Tea Co.* (1870) L. R. 10 Eq. 458; 39 L. J. Ch. 829 (on same facts); *Ex parte Chorley* (1870) L. R. 11 Eq. 157; 40 L. J. Ch. 153; cp. *Re Bahia & San Francisco Ry. Co.* (1868) L. R. 3 Q. B. 584; 37 L. J. Q. B. 176. *Qu. can Athenæum Life Assurance Soc. v. Pooley* (1858) 3 De G. & J. 294; 28 L. J. Ch. 119, be reconciled with these cases? It seems not: *Brunton's claim* (1874) L. R. 19 Eq. 302, 312; 44 L. J. Ch. 450.

¹⁴ *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* (1877) 3 Ch. D. 205; 46 L. J. Ch. 418.

¹⁵ In principle it is the same as the case put in the Digest (50, 17, de reg. juris, 23) "non valere si convenerit, ne dolus praestetur."

¹⁶ (1869) L. R. 8 Eq. 36; 38 L. J. Ch. 374.

¹⁷ The evidence was conflicting, but the Court took this view of the facts: see L. R. 8 Eq. at 43.

being raised upon it, there was no intention expressed on the face of it that it should be assignable free from equities.

However, if the contract were not enforceable as between the original parties only by reason of their being *in pari delicto*, as not having complied with statutory requirements or the like, an assignee for value without notice of the original defect will, at all events have a good title by estoppel.¹⁸

We may now observe the difficulties which make the mere assignment of a contract inadequate for the requirements of commerce, and to meet which negotiable instruments have been introduced.

The assignee of a contract is under two inconveniences.¹⁹ The first is that he may be met with any defence which would have been good against his assignor. This, we have seen, may to a considerable extent if not altogether be obviated by the agreement of the original contracting parties.

The second is that he must prove his own title and that of the intermediate assignees if any, and for this purpose he must inquire into the title of his immediate assignor. This can be in part, but only in part provided against by agreement of the parties. It is quite competent for them to stipulate that as between themselves payment to the holder of a particular document shall be a good discharge, but such a stipulation will neither affect the rights of intermediate assignees nor enable the holder to compel payment without proving his title. Parties cannot set up a market overt for contractual rights.

NEGOTIABLE INSTRUMENTS

The complete solution of the problem for which the ordinary law of contract is inadequate is attained by the law merchant²⁰ in the following manner:

(i) The absolute benefit of the contract is attached to the ownership of the document which according to ordinary rules would be only evidence of the contract.

(ii) The proof of ownership is then facilitated by prescribing a mode of transfer which makes the instrument itself an authentic record of the successive transfers. This is the case with instruments transferable by indorsement.

(iii) Finally this proof is dispensed with by presuming the *bona fide* possessor of the instrument to be the true owner. This is the case with instruments transferable by delivery, which are negotiable in the fullest sense of the word.

¹⁸ See *Webb v. Herne Bay Commissioners* (1870) 1 L. R. 4 Q. B. 642, 39 L. J. Q. B. 221.

¹⁹ Cf. Savigny, *Obl.* § 62.

²⁰ Extended to promissory notes by statute 3 & 4 Anne c. 8 (in *Rev. Stat.*), ss. 1-3, now superseded and repealed by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). As to the earliest forms of bills of exchange, see Jules Valéry, "Une traite de Philippe le Bel" Paris, 1909, *Rev. gen. du droit*, xxxii. 485 (1908).

The result is that the contract is completely embodied²¹ for all practical purposes in the instrument which is the symbol of the contract: and both the right under the contract and the property in the instrument are treated in a manner quite at variance with the general principles of contract and ownership. We give references to a few passages where specimens will be found of the positive terms in which the privileges of *bona fide* holders of negotiable instruments have been repeatedly asserted by the highest judicial authority.²²

The narrower doctrine which for a time prevailed, requiring a certain measure of caution on the part of the holder, is now completely exploded. Nothing short of actual knowledge of the facts affecting his transferor's title or willful and therefore dishonest avoidance of inquiry will defeat the holder's right.²³

Moreover, there is no discrepancy between common law and equity in this matter. Equity has interfered in certain cases of forgery and fraud to restrain negotiation; but at law no title to sue on the instrument can be made through a forgery;²⁴ and "the cases of fraud where a bill has been ordered to be given up are . . . confined to those where the possession, but for the fraud, would be that of the plaintiff in equity."²⁵ The rights of *bona fide* holders for value are as fully protected in equity as at common law, and against such a holder equity will not interfere.²⁶

The most frequent examples of negotiable instruments are bills of exchange (of which cheques are a species)²⁷ and promissory notes. Then exceptional qualities are concisely stated in *Crouch v. Crédit Foncier*.²⁸

"Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who, by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value he has a good title

²¹ "Verkörperung der Obligation," Savigny.

²² See per Byles J. *Swan v. N. B. Australasian Co.* (1863) 1 Ex. Ch. 2 H. & C. 184; 31 L. J. Ex. 425; per Lord Campbell, *Brandao v. Barnett* (1846) 12 Cl. & F. 787; 69 R. R. 204; opinion of Supreme Court, U.S., delivered by Story J. *Swift v. Tyson* (1842) 16 Peters, 1, 15. The following references as to the nature of the contracts undertaken by the parties to a bill of exchange may be found useful. Acceptor and drawer: *Jones v. Broadhurst* (1850) 9 C. B. 173, 181; 82 R. R. 336; *Lebel v. Tucker* (1867) L. R. 3 Q. B. 77, 84; 37 L. J. Q. B. 46. Indorser: L. R. 3 Q. B. 83; *Denlan v. Peters* (1870) L. R. 5 Q. B. 475, 477.

²³ Lord Blackburn in *Jones v. Gordon* (1877) 2 App. Ca. at 629.

²⁴ *Goodman v. Harvey* (1836) 4 A. & E. 870, 876; 43 R. R. 507, 509; *Raphael v. Bank of England* (1855) 17 C. B. 161, 175; 25 L. J. C. P. 33; 140 R. R. 638, 647; Bills of Exchange Act, s. 90, and Sir M. Chalmers' note thereon.

²⁵ The *bona fide* holder of an instrument with a forged indorsement may be exposed to considerable hardship. See *Bobbett v. Pinkett* (1876) 1 Ex. D. 368; 35 L. J. Ex. 555.

²⁶ *Jones v. Lane* (1838-9) 3 Y. & C. Ex. Eq. 281, 293.

²⁷ *Thurde mann v. Goldschmidt* (1859) 1 D. F. J. 4.

²⁸ Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 73. And they are equally negotiable: *M'Lean v. Clydesdale Banking Co.* (1883) 9 App. Ca. 95. [As to the "acceptance" of a cheque, in the sense in which that word is applied to other bills of exchange, see *Bank of Baroda, Ltd. v. Punjab National Bank, Ltd.* [1944] A. C. 176 (J.C.).]

²⁹ (1873) L. R. 8 Q. B. 374, 382; 42 L. J. Q. B. 183.

notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it."

It is doubtful at common law whether the seal of a corporation can be treated as equivalent to signature for the purpose of making a bill or note under it negotiable; in England the doubt is removed by the Bills of Exchange Act.¹⁹

A negotiable instrument must be a contract to pay money or to deliver another negotiable security representing money; therefore a promise in writing to deliver 1,000 tons of iron to the bearer is not negotiable and gives no right of action to the possessor.²

Mere private agreement or *particular* custom cannot be admitted as part of the law merchant so as to introduce new kinds of negotiable instruments. But the fact that a *universal* mercantile usage is modern is no reason against its being judicially recognized as part of the law merchant. The notion that general usage is insufficient merely because it is not ancient is founded on the erroneous assumption that the law merchant is to be treated as fixed and invariable. The negotiability of debentures issued by limited companies is now recognized on the ground of general though modern mercantile custom.²¹

The bonds of foreign governments issued abroad and treated in the English market as negotiable instruments are recognized as such by law. So is the provisional scrip issued in England by the agent of a foreign government as preparatory to giving definite bonds.²² Such bonds or scrip and other foreign instruments negotiable by the law of the country where they are made may be recognized as negotiable by our Courts though they do not satisfy all the conditions of an English negotiable instrument.²³

¹⁹ But the addition of the seal will not prevent an instrument from being a good bill or note if it is also signed by an agent or agents for the company so that it would be good without the seal. See *Halford v. Cameron & Coalbrook &c Co* (1851) 16 Q. B. 442, 20 L. J. Q. B. 110; *Irish v. Vubalon* 1836 1 H. & N. 113, 5 L. J. Ex. 348, 108 R. R. 311; *Belfour v. Ernest* 1859 5 C. B. N. S. 601, 28 L. J. C. P. 170, 116 R. R. 788; *Dutton v. Marsh* 1871 L. R. 6 Q. B. 361, 40 L. J. Q. B. 175. Bills of Exchange Act 1892, 45 & 46 Vict. c. 61, s. 91.
Goodwin v. Roberts 1870 L. R. 10 Ex. 337, Ex. Ch. 1 App. Ca. 176, 39 L. J. Ex. 718.

²¹ *Dixon v. Bodd* 1856 3 Macq. 1, 106 R. R. 987. A daring attempt to dismiss Lord Cranworth's opinion as not material to the decision may be seen in L. Q. R. xlviii 76 Jan. 1932 in any case Lord Cranworth only declared an accepted rule. Such a contract may however be made assignable free from equities. *Merchant Banking Co of London v. Phoenix Bessemer Steel Co* 1877 5 Ch. D. 205, 46 L. J. Ch. 418.

²² *Goodwin v. Roberts*, note ²¹ overruling *Crouch v. Crédit Foncier* on this point. *Rumball v. Metropolitan Bank* 1877 2 Q. B. D. 194, 46 L. J. Q. B. 346.

²³ *Bechuanaland Exploration Co v. London Trading Bank* [1898] 2 Q. B. 651, 67 L. J. Q. B. 986, followed by *Bigham J. in Edelstein v. Schuler & Co* [1902] 2 K. B. 144, 71 L. J. K. B. 572, and so the law is now settled. Proof of general usage and recognition in England is enough. The original reason was that a jury as "the country," could have no knowledge of what was usual elsewhere.

²⁴ *Gorgier v. Merville* (1824) 3 B. & C. 45, 27 R. R. 290. Negotiability in a foreign market is not enough. *Pickler v. London and County Banking Co* (1887) 18 Q. B. Div. 515.

²⁵ *Goodwin v. Roberts* (1876) L. R. 10 Ex. 76, affd in Ex. Ch. 16 337 in H. L. 1 App. Ca. 476, 45 L. J. Ex. 748.

²⁶ See *Crouch v. Crédit Foncier* (1873) L. R. 8 Q. B. at 384-5, *Goodwin v. Roberts* 1 App. Ca. at 494-5.

From what was said in *Goodwin v. Roberts*³³ in the House of Lords it seems that where the holder of an instrument purporting on the face of it to be negotiable, and in fact usually dealt with as such, intrusts it to a broker or agent who deals with it in the market where such usage prevails, he is estopped from denying its negotiable quality as against any one who in good faith and for value takes it from the broker or agent. But where a person takes documents of value, negotiable or not, from one whom he knows to be an agent having limited authority, he must at his own peril ascertain what that authority is; and this whether his knowledge be derived from the principal or not."

An instrument which has been negotiable may cease to be so in various ways, namely:—

Payment by the person ultimately liable."³⁴

Restrictive indorsement."³⁵

Crossing with the words "not negotiable."³⁶

To a certain extent in the case of bills payable to order, indorsement when overdue, which makes the indorsee's rights subject to what are called equities attaching to the bill itself, e.g., an agreement between the original parties to the bill that in certain events the acceptor shall not be held liable, but not to collateral equities such as set-off."³⁷

BURDEN AS WELL AS BENEFIT, WHEN TRANSFERABLE.

We have purposely left to the last the consideration of certain important classes of contracts which may be roughly described as involving the transfer of duties as well as of rights. This happens in the cases

(A) Of transferable shares in partnerships and companies.

(B) Of obligations³⁸ attached to ownership or interests in property.

A. The contract of partnership generally involves personal confidence, and is therefore of a strictly personal character. But, there is nothing in law against agreed provisions for the introduction of new partners on specified terms, and such provisions are common in partnership articles."³⁹

³³ 1 App. Ca. 486, 498, 493, 497.

³⁴ *Earl of Sheffield v. London Joint Stock Bank* (1888) 13 App. Ca. 333, 37 L. J. Ch. 986. This applies only where there is actual knowledge of the limited authority: *London Joint Stock Bank v. Simons* ([1892] A. C. 201; 61 L. J. Ch. 723).

³⁵ *Lazarus v. Cowie* (1842) 3 Q. B. 464. As to the possibility of suing on a bill after it has been paid by some other person, see *Cook v. Lister* (1863) 13 C. B. N. S. 543, 32 L. J. C. P. 121.

³⁶ Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 35, 36.

³⁷ Bills of Exchange Act, 1882, s. 77. A person taking a cheque so crossed has not and cannot give a better title than the person from whom he took it: s. 81. The practice of crossing cheques is unknown in America.

³⁸ See *Ex parte Swan* (1868) L. R. 6 Eq. 344, 359, where the authorities are discussed.

³⁹ We use the word here in its wide sense so as to denote the benefit or burden of a contract, or both, according to the nature of the case.

⁴⁰ See *Lindley, Partnership* (10th ed. 1935), 513 seq.

At common law the number of persons engaged in a contract of partnership does not make any difference in the nature or validity of the contract; hence it follows that if in a partnership of two or three the share of a partner may be transferred on terms agreed on by the original partners, there is nothing at common law to prevent the same arrangement from being made in the case of a larger partnership, however numerous the members may be; in other words, unincorporated companies with transferable shares are not unlawful at common law. But this is now only of historical interest.

At first sight this may seem to involve the anomaly of a floating contract between all the members of the partnership for the time being, who by the nature of the case are unascertained persons when we look to any future time." But there is really no exception from the ordinary rules of contract. It was pointed out by Lord Westbury that the transfer of a share in a partnership at common law is strictly not the transfer of the outgoing partner's contract to the incoming partner, but the formation of a new contract. "By the ordinary law of partnership as it existed previously to the Companies Acts 'a partner could not transfer to another person his share in the partnership. Even if he attempted to do so with the consent of the other partners, it would not be a transfer of his share, it would in effect be the creation of a new partnership.'" This therefore is to be added to the cases in which we have already found apparent anomalies to vanish on closer examination.

Notwithstanding the theoretical legality of unincorporated companies, there does not appear to be any very satisfactory way of enforcing either the claims of such a company against an individual member," or those of an individual member against the company." But under the modern law of companies questions of this kind have no practical importance in this country. In like manner the transfer of shares in companies as well as their original formation is almost entirely governed by modern statutes.

B. Obligations by or in the nature of contract attached to ownership or interests in property are of several kinds. With regard to those attached to estates and interests in land, which alone offer any great matter for observation, the discussion of them in detail is usually and conveniently treated as belonging to the law of real property. There are, however, matters of general principle to be noted, and misunderstanding to be avoided, as to the respective methods of common law and equity in dealing with burdens imposed on the use of land by contract.

The law has been much simplified by the recent body of legislation recasting the Law of Property, but a summary statement of the former law may still be useful for reference.

¹¹ Cp. per Abbott C. J. in *Josephs v Peirer* (1825) 3 B. & C. 639, 641. This line of objection, however, does not appear to have been distinctly taken in any of the cases where the legality of joint-stock companies was discussed.

¹² *Webb v Whiffin* (1872) L. R. 5 H. L. 711, 726—727; 42 L. J. Ch. 161.

¹³ We have seen (pp. 168—169) that they cannot empower an officer to sue on behalf of the association.

¹⁴ See *Lyon v Haynes* (1843) 5 M. & Gr. 504. A partner can now sue or be sued by the partnership in the firm-name. See Ord. XLVIII. rr. 1, 10.

OBLIGATIONS ATTACHED TO OWNERSHIP AND INTERESTS
IN PROPERTY

I. GOODS.

A contract cannot be annexed to goods so as to follow the property in the goods either at common law³⁰ or in equity.³¹ [A qualification of this appears in the decision of the Judicial Committee in *Lord Strathcona S.S. Co. v. Dominion Coal Co.* [1926] A. C. 108; 95 L. J. P. C. 71. The Dominion Co. held on a long term charter-party a ship owned by the X. Co. The X. Co. sold the ship to the Strathcona Co., who took with notice of the charter-party, but contended that it was not binding on them, because there was no privity of contract between them and the Dominion Co. The Judicial Committee held that this defence was bad, for "if a man acquires from another rights in a ship which is already under charter, with notice of rights which required the ship to be used for a particular purpose and not inconsistently with it, then he appears to be plainly in the position of a constructive trustee with obligations which a court of equity will not permit him to violate" (at 125). They approved and applied a *dictum* of Knight Bruce L.J. in *De Mattos v. Gibson*:³² "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract . . . made by him with a third person to use and employ the property for a particular purpose in a specified manner the acquirer shall not to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller" The limits of this doctrine were postulated by the Judicial Committee. It applies only to *user* of the article transferred and an interest in that article must remain with the person who seeks (as in the *Strathcona* case) to enforce it by injunction. This, it has been said,³³ marks the distinction between the *Strathcona* case and decisions like those in *McGruther v. Pitcher*,³⁴ where it was held that it is futile for A, the seller of an article, to attempt (unless he is the patentee of an invention connected with it) to impose conditions on its resale by B, the buyer, to third parties. But it has also been urged that, even thus limited, the exact scope of the doctrine is uncertain.³⁵ In fact, we have here in a rather different guise the difficulty (discussed on pp. 167—168) that arises in determining the boundary between privity of contract and a trust in favour of a stranger to the contract.³⁶]

By the Bill of Lading Act, 1855 (18 & 19 Vict. c. 111) the indorsement of a bill of lading operates as a legal transfer of the contract, if and whenever by the law merchant it operates as a transfer of the property in the goods.

³⁰ 3rd resolution in *Spencer's case*, 1 Sm. L. C. 65; *Splidt v. Bowles* (1808) 10 East, 279; 10 R. R. 296. "In general contracts do not by the law of England run with goods." *Blackburn on Sale*, 276; *Taddy & Co. v. Sterious & Co.* [1904] 1 Ch. 354; 73 L. J. Ch. 191; *McGruther v. Pitcher* [1904] 2 Ch. 306; 73 L. J. Ch. 653. C. A. [it must be assumed in this case that the person referred to as a "factor" was not the agent of McGruther]; *Betts-Merrill Co. v. Straus* (1908) 210 U. S. 339.

³¹ *De Mattos v. Gibson* (1858) 4 De G. & J. 276, 295; 124 R. R. 250.

³² [(1859) 4 De G. & J. 276, 282. See the observations of Lord Greene, M.R., in *Greenhalgh v. Mallard* [1943] 2 All E. R. 234, 239, on this case and on *Lord Strathcona S.S. Co. v. Dominion Coal Co.* [1926] A. C. 108 (text, *supra*)].

³³ [The learned editor of Anson, *Law of Contract* (19th ed.), 253—254.]

³⁴ [1904] 2 Ch. 306; 73 L. J. Ch. 653.]

³⁵ [Dr. E. C. S. Wade in 42 L. Q. R. (1926) 139—141; 44 L. Q. R. (1928) 51—65.]

³⁶ [Cf. Winfield, *Province of Tort*, 104—108.]

II. LAND.¹

1 Relations between landlord and tenant on a demise.

Burden:

of lessee's covenants

As to an existing thing parcel of the demise, assignees are bound whether named or not.²As to something to be newly made on the premises, assignees are bound only if named.³ [in a lease made after the Law of Property Act, 1925, s. 79, took effect, they are deemed to have been named, unless the lease shews a contrary intention.]

of lessor's covenants

runs with the reversion

(Grantees of Reversions Act, 1540) (32 Hen 8, c. 34), repealed, Law of Property Act, 1925 (15 & 16 Geo 5, c. 20), s. 207, and Sch VII. [Ss 141, 142 replace the Act of Hen VIII and they apply to leases whether made before or after the Act.]

Benefit

of lessee's covenants

runs with the reversion

(32 Hen VIII c. 34 [now repealed])

The statute of Hen VIII applied only to demises under seal,⁴ and included (by construction in *Spencer's* case) only such covenants as *touch and concern the thing demised*.⁵ The Law of Property Act 1925 s. 141, sub-s (1), preserves this rule in the phrase "having reference to the subject-matter" of the lease.⁶ It applied only to the reversion which the covenantor had at the time of entering into the covenant.⁷

of lessor's covenants

runs with the tenancy

(Now embodied in Law of Property Act, 1925 ss. 78, 79.)

A covenant giving the lessee an option of purchasing the reversion at a fixed rate at any time during the term was not within the statute, as it did not concern the tenancy of the land considered as the subject-matter of the lease.⁸ A covenant with an underlessee to perform a covenant in the superior lease relating to premises not comprised in the underlease was collateral and did not bind assignees.⁹

¹ On this generally, see Dart V & P. 8th ed. (1926) 639 *seq.*, [Woodfall Landlord and Tenant 24th ed. 1939], 548 *seq.*, 845 *seq.*, 3rd Report of R. P. Commission, Day Conv. 1 122 (4th ed.), and above all the notes to *Spencer's case* in 1 Sm. L. C. and also as to covenants in leases, the notes to *Thurby v. Plant* 1 Wms. Saund. 278-281, 290, 305.

² Covenants not to assign or sublet. *Goldstein v. Sanders* [1915] 1 Ch. 539, 84 L. J. Ch. 386, *Re R. Stephenson & Co* [1915] 1 Ch. 802, 84 L. J. Ch. 563.

³ As to this distinction, see 1 Sm. L. C. 70 *seq.*

⁴ E.g., *Smith v. Eggington* (1874) L. R. 9 C. P. 145, 43 L. J. C. P. 140.

⁵ For the meaning of this, see 1 Sm. L. C. 65, *Fleetwood v. Hall* 1880 21 Q. B. D. 35; 58 L. J. Q. B. 341.

⁶ *Muller v. Trafford* [1901] 1 Ch. 54, 70 L. J. Ch. 72.

⁷ *Woodall v. Clifton* [1905] 2 Ch. 257, 74 L. J. Ch. 555, C. A.

⁸ *Dewar v. Goodman* [1908] 1 K. B. 94; 77 L. J. K. B. 160, C. A., [1909] A. C. 72, 78 L. J. K. B. 209. See further *Dyson v. Forster* [1909] A. C. 98, 78 L. J. K. B. 246; *Ricketts v. Enfield Churchwardens* [1909] 1 Ch. 544, 553; 78 L. J. Ch. 294; L. Q. R. xxv, 117, 280. [These decisions still hold good since the Law of Property Act, 1925. For many other illustrations, see Woodfall, *op. cit.* 559 *seq.*]

NOTE

- (i) The lessee may safely pay rent¹¹ to his lessor so long as he has no notice of any grant over of the reversion Act of 1705, 4 & 5 Anne, c. 3 (in Rev Stat. at 4 Anne c. 16) which is in fact a declaration of common law see per Willes J., L. R. 5 C. P. 594
- (ii) The lessee may still be sued on his express covenants (though under the old practice he could not be sued *in debt* for rent) after an assignment of the term¹²
- (iii) The doctrine concerning a reversion in a term of years is the same as concerning a freehold reversion¹³
- (iv) Where the statute of Henry VIII does not apply, the assignee of the reversion cannot sue an original lessee who has assigned over all his estate there being neither privity of estate nor privity of contract¹⁴

2 Mortgage debts

Restrictive covenants [otherwise than between lessor and lessee] made since 1925 are not binding on purchasers for values unless registered under the Land Charges Act 1925 (15 & 16 Geo. 5, c. 22)

The transfer of a mortgage security operates *in equity* as a transfer of the debt¹⁵ The transfer is now a *legal* one as to mortgages transferred after the Law of Property Act 1925 s. 114 took effect.] Notice to the mortgagor is not needed to make the assignment valid, but without such notice the assignee is bound by the state of the accounts between mortgagor and mortgagee¹⁶

3 Rent-charges and annuities imposed on land independently of tenancy or occupation¹⁷

An agreement to grant an annuity charged on land implies an agreement to give a personal covenant for payment¹⁸ but by a somewhat curious distinction the burden of a covenant to pay a rent-charge does not run with the land charged nor does the benefit of it run with the rent¹⁹

4 Other covenants not between landlord and tenant relating to land and entered into with the owner of it

¹¹ In the case of the lessee's covenants other than for payment of rent an assignee of the reversion is not bound to give notice of the assignment to the lessee as a condition precedent to enforcing his rights *Scallock v. Harston* (1875) 1 C. P. D. 106 45 [1] C. P. 121

¹² 1 Wms. Saund. 298

¹³ [*Oxley v. James* (1844) 13 M. & W. 290]

¹⁴ *Allcock v. Moorhouse* 1882 9 Q. B. Div. 366

¹⁵ This is one of the cases in which the equitable transfer of a debt is not made a legal transfer by the Judicature Act 1873 (36 & 37 Vict. c. 66). In practice an express assignment of the debt is always added the old power of attorney however is now superfluous.

Jones v. Gibbons (1804) 4 Ves. 407 411 7 R. R. 247 *Mattheis v. Wallwyn* (1798) 4 Ves. 118 126

¹⁶ These must be regarded as arising from contract (we do not speak of rents or services incident to *tenure*) the treatment of rent-charges in English law as real rights or incorporeal hereditaments seems arbitrary. For a real right is the power of exercising some limited part of the rights of ownership, and is quite distinct from the right to receive a fixed payment without the immediate power of doing any act of ownership on the property on which the payment is secured.

Bauer v. Cooper (1842) 2 Ha. 408, 11 L. J. Ch. 287, 62 R. R. 161

¹⁷ 1 Wms. Saund. 303 [*Haywood v. Brunswick Building Society* (1881) 8 Q. B. D. 403,

51 L. J. Q. B. 73 *Grant v. Edmondson* [1931] 1 Ch. 1, 100 L. J. Ch. 1]

¹⁸ [The following monographs should be noticed Jolly, *Restrictive Covenants* (2nd ed. 1931), Behan, *Covenants* (1924). See, too, S. J. Bailey in 6 *Cambridge Law Journal* (1938), 339-366, W. Strachan in 46 L. Q. R. (1930), 159-168, G. R. Y. Radcliffe in 57 L. Q. R. (1941), 203-211.]

The benefit runs with the covenantor's estate so that an assignee can sue at common law. "But in equity the benefit of a restrictive covenant may run with the land, so that the lessee for years of the covenantor may enforce the covenant as an assign if assigns are named." It is immaterial whether the covenantor was the person who conveyed the land to the covenantor or a stranger.¹⁴ The usual vendor's covenants for title come under this head. It is doubtful whether a *bona fide* purchaser from a purchaser who obtained his conveyance by fraud can in any circumstances sue on the former vendor's covenants for title.¹⁵

5 The like covenant enter into by the owner

The burden of such covenants appears on the whole not to run with the land in any case at common law.¹⁶ But where a right or easement affecting land such as a right to get minerals free from the ordinary duty of not letting down the surface is granted subject to the duty of paying compensation for damage done to the land by the exercise of the right, there the duty of paying compensation runs at law with the benefit of the grant. Here however the correct view seems to be that the right itself is a qualified one: i.e. to let down the surface &c. paying compensation, and not otherwise.¹⁷

The burden is said to run with the land in equity¹⁸ subject to the limitation to be mentioned in this sense: that a court of equity will enforce the covenant against assignees who have actual or constructive notice of it but unless the covenantor is in possession of or interested in land for the benefit of which the covenant was made an owner deriving title from the covenantor is not bound by the covenant even if he took with notice of it.¹⁹

Explanation. Let us call the land on the use of which a restriction imposed by covenant the *quasi-servient* tenement and the land for whose benefit it is imposed the *quasi-dominant* tenement. Now restrictive covenants may be entered into

- (1) By a vendor as to the use of other land retained or simultaneously sold for the benefit of the land sold by him.

In this case the burden runs with the quasi-servient tenement and the benefit also runs with the quasi-dominant tenement.

- (2) By a purchaser as to the use of the land purchased by him for the benefit of other land retained or simultaneously sold by the vendor.

Tate v. Gilling [1879] 11 Ch D 273, 48 I. J. Ch. 597. [See also *Roger v. Hosegood* [1900] 2 Ch. 388, 69 I. J. Ch. 652.]

¹⁴ *Contra* Sugd. V. & P. 784-7 but alone among modern writers. The cases from the Year Books relied on by Lord St. Leonards' *Pakenham's case* II 32 I. III 3, pl. 14, *Horne's case* M. & H. IV 6 pl. 25 seem to show only that it was once thought doubtful whether the assignee could sue without being also *heir* of the original covenantor. See also O. W. Holmes, *The Common Law*, 395, 404.

¹⁵ *Onward Building Society v. Smithson* [1893] 1 Ch. 1, 15, 62 I. J. Ch. 138 (C. A.).
¹⁶ 3rd Report of R. P. Commissioners in 1 Day Conv. *Austerberry v. Corporation of Oldham* 1885 29 Ch. Div. 750, 55 L. J. Ch. 633. Farwell J. in *Roger v. Hosegood* [1900] 2 Ch. 388, 395, 69 L. J. Ch. 59.

¹⁷ *Ipden v. Seddon* 1876 1 Ex. Div. 496, 500, 46 I. J. Ex. 353.

¹⁸ The phrase is not free from objection, per Right J. [1900] 2 Ch. at 401. See however *Nisbet and Potts' Contract* [1906] 1 Ch. 386, 404, 405.

¹⁹ *Wilson v. Hart* 1886 1 R. & Ch. 463, *Palman v. Harland* 1881 17 Ch. D. 353, 50 L. J. Ch. 612.

²⁰ *L. C. C. v. Allen* [1914] 3 K. B. 642 (C. A.), *Millbourn v. Lyons* [1914] 2 Ch. 231 (C. A.). See also S. J. Bailey in 6 Cambridge Law Journal, 341. Two statutory exceptions to this rule are contained in the Town and Country Planning Act, 1932 (22 & 23 Geo. 5, c. 48), s. 34, and the Housing Act, 1936 (26 Geo. 5 & 1 Ed. 8, c. 51), s. 148, they are for the benefit of local authorities.]

In this case the burden runs with the quasi-servient tenement, and the benefit *may* run with the quasi-dominant tenement when such is the intention of the parties, and especially when a portion of land is divided into several tenements and dealt with according to a prescribed plan or "building scheme."¹²

All these rights and liabilities being purely equitable are like all other equitable rights and liabilities subject to the rule that purchase for value without notice is an absolute defence. An assign of a covenantee may be entitled to the benefit of the covenant without having known of it at the date of his purchase: the question is whether he acquired it as annexed to the land.¹³

Further, this doctrine applies only to restrictive, not to affirmative covenants. Thus it does not apply to a covenant to repair. "Only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice."¹⁴ It does not apply to merely personal and collateral covenants.¹⁵

[The author, it will be noticed, barely refers to the changes effected by the legislation of 1925. As he warns the reader in the last paragraph of this chapter that the book does not profess to be a guide to modern practice, it will be sufficient to give here brief references to the relevant parts of the Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), in addition to those already given by the editor and, in the following pages, by the author. Fuller details must be sought in the leading treatises on the topic.¹⁶

Law of Property Act, s. 56 sub-s. (1)—A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement respecting land or other property, although he may not be named as a party to the instrument.¹⁷

S. 78, sub-s. (1)—A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them. In connexion with covenants restrictive of the user of land, "successors in title" include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

S. 79, sub-s. (7)—A covenant relating to any land of a covenantor shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself and his successors in title and the persons deriving title under him or them.¹⁸ "Successors in title" has the same scope as in s. 78.

¹² *Keates v. Lyon* (1869) 1 L. R. 4 Ch. 218; 38 L. J. Ch. 357, and other cases there considered; *Harrison v. Good* (1871) L. R. 11 Eq. 338; 40 L. J. Ch. 294; *Renals v. Croulishau* (1878) 4 Ch. D. 125; 11 Ch. Div. 866; 48 L. J. Ch. 830; *Spicer v. Martin* (1893) 14 App. Ca. 12; 58 L. J. Ch. 309; *Rogers v. Hosegood* [1900] 2 Ch. 388; 69 L. J. Ch. 652, C. A.; [*Elliston v. Reacher* [1908] 2 Ch. 374; and in C. A. *ib.* 665; 77 L. J. Ch. 619; 78 L. J. Ch. 87]. As to the position of a lessee of an owner bound by a restrictive covenant, *Holloway Bros. v. Hill* [1902] 2 Ch. 612; 71 L. J. Ch. 818.

¹³ *Rogers v. Hosegood*, last note.

¹⁴ *Lindley L.J. Haywood v. Brunstuck Building Society* (1881) 8 Q. B. Div. 403, 410; 51 L. J. Q. B. 73; *L. & S. W. Ry. Co. v. Gomm* (1882), 20 Ch. Div. 562; 51 L. J. Ch. 530; *Austerberry v. Corporation of Oldham* (1885), note ¹⁵, ante; *Hall v. Ewin* (1887) 37 Ch. Div. 74; 57 L. J. Ch. 95.

¹⁵ *Formby v. Barker* [1903] 2 Ch. 539; 72 L. J. Ch. 716, C. A.

¹⁶ [See note ¹⁴, p. 185, and add Dart, *Vendors and Purchasers* (8th ed. 1929), *Smith's Leading Cases* (13th ed. 1929), 51--103.]

¹⁷ [See *White v. Bijou Mansions* [1938] Ch. 351; 107 L. J. Ch. 212. This and other authorities are discussed by Mr. Bailey in 6 Cambridge L. J. 345-347.]

¹⁸ [The effect of this section has been much debated: see *Smith's Leading Cases*, 92 *seq.*]

S. 80, sub-s. (3)—The benefit of a covenant relating to land entered into after the commencement of the Act may be made to run with the land without the use of any technical expression if the covenant is such that the benefit of it could have been made to run with the land before the Act.]

[S. 78 above is a recasting of s. 58 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), but s. 79 creates an entirely new rule.]

The only points which seem to call for more notice here are the doctrines as to bills of lading (I.) and restrictive covenants as to the use of land (II. 5).

As to (I.) it is to be borne in mind that bills of lading are not properly negotiable instruments, though they may be called so in a limited sense "as against stoppage *in transitu* only."¹¹ As far as the law merchant goes the bill of lading only represents the goods, and does not enable any one who gets it into his hands to give a better title than his own to a transferee: "the transfer of the symbol does not operate more than a transfer of what is represented."¹² And the whole effect of the statute is to attach the rights and liabilities of the shipper's contract not to the symbol, but to the property in the goods themselves: "the right to sue on the contract contained in the bill of lading is made to "follow the property in the goods therein specified; that is to say, the legal title to the goods as against the indorser."¹³

As to (II. 5) the theory of the common law is to the following effect. The normal operation of a contract, as we have already had occasion to say, is to limit or cut short in some way the contracting party's control over his own actions. Among other kinds of action the exercise of rights of ownership over a particular portion of property may be thus limited. So far then an owner "may bind himself by covenant to allow any right he pleases over his property"¹⁴ or to deal with it in any way not unlawful or against public policy.¹⁵ But if it be sought to annex such an obligation to the property itself, this is a manifest departure from the ordinary rules of contract. An obligation attached to property in this manner ceases to be only a burden on the freedom of the contracting party's individual action, and becomes practically a burden on the freedom of ownership. Now the extent to which the law will recognize such burdens is already defined. Certain well known kinds of permanent burdens are imposed by law, or may be imposed by the act of the owner, on

¹¹ Per Willes J. *Fuentes v. Monts* (1868) L. R. 3 C. P. at 476; 38 L. J. C. P. 95. See, too, S. J. Bailey in 6 Cambridge L. J. 354, 355.

¹² *Gurney v. Behrend* (1854) 3 F. & B. 622, 634; 23 L. J. Q. B. 265; 97 R. R. 687, 695.

¹³ *Fox v. Nott* (1861) 6 H. & N. 630, 636; 30 L. J. Ex. 259; *Smurthwaite v. Wilkins* (1862) 11 C. B. N. S. 842, 850; 31 L. J. C. P. 214.

¹⁴ *The Freedom* (1871), L. R. 3 P. C. 594, 599. As to indorsement by way of pledge, see *Swallow v. Burdick* (1884) 10 App. Ca. 74, 103.

¹⁵ *Hill v. Tupper* (1863) 2 H. & C. 121, 127; 32 L. J. Ex. 217.

¹⁶ It is not [apart from certain statutory exceptions] unlawful for a landowner to let all his land lie waste; but a covenant to do so would probably be invalid.

the use of land, for the permanent benefit of other land; these, and these only, are recognized as being necessary for the ordinary convenience of mankind, and new kinds cannot be admitted. And this principle, it may be observed, is not peculiar to the law of England." Easements and other real rights *in re aliena* cannot therefore be extended at the arbitrary discretion of private owners. "it is not competent for an owner of land to render it subject to a new species of burden at his fancy or caprice"" Still less is it allowable to create new kinds of tenure or to attach to property incidents hitherto unknown to the law. But if it is not convenient or allowable that these things should be done directly in the form of easements neither is it convenient or allowable that they should be done indirectly in the form of obligations created by contract but annexed to ownership. If the burden of restrictive covenants is to run with land, people can practically create new easements and new kinds of tenure to an indefinite extent. Such appears to be the view of legal policy on which the common law doctrine rests."

The history of the doctrine in the Court of Chancery is somewhat curious. Lord Brougham in an elaborate judgment which seems to have been intended to settle the question," treated what we have called the common law theory as final, and, ignoring the difference between positive and negative covenants, broadly laid down that where a covenant does not run with the land at law, an assignee cannot be affected by notice of it. But this judgment, though treated as an authority in courts of law " was never followed in courts of equity. After being disregarded in two reported cases¹ it was overruled by Lord Cottenham in *Fulk v. Moxhay*,²

¹ Cp. Savigny, *Obl.* 117, and for a singular coincidence in detail D. 8, 3, de serv. praed. rust., § 1, 6 pr. *Clayton v. Corby* (1843) 5 Q. B. 415, 14 L. J. Q. B. 364.

² Per Martin B. *Vutall v. Bracewell* (1866) L. R. 2 Ex. 1, 10, 36 L. J. Ex. 1, 143 R. R. 867, for the C. L. principles generally see *Ackroyd v. Smith* (1850) 10 C. B. 164, 19 L. J. C. P. 315, 84 R. R. 507, *Bailey v. Stephens* (1862) 12 C. B. N. S. 91, 31 L. J. C. P. 226. Rights of this kind are to be carefully distinguished from those created by grants in gross, see per Willes J. *ib.* 12 C. B. N. S. 111. The Courts might have held that new negative easements might be created, but not positive ones, but this solution does not seem to have ever been definitely proposed, although the modern doctrine of equity as set forth in *Visbet & Potts' contract* [1906] 1 Ch. 386, 75 L. J. Ch. 238 C. A., comes very near it, and the whole subject of negative easements is still obscure as is shown by the widely different opinions held in *Dalton v. Angus* (1881) 6 App. Ca. 740, 50 L. J. Q. B. 689. [Neither the text nor this note would warrant the conclusion that the list of easements is closed, but it is worth while to state positively that the trend of modern cases is in favour of the view that new easements can be created provided that they comply with the conditions formulated for the creation of easements in general. See Gale, *Easements* 11th ed. 1932, 88-92.]

³ See per Willes J. delivering the judgment of the Ex. Ch. in *Dennett v. Atherton* (1872) L. R. 7 Q. B. 116, 325.

⁴ *Keppel v. Bailey* (1834) 2 M. & K. 517, 527, 39 R. R. 264, 270, and see the preface to that volume.

⁵ *Hill v. Tupper* (1863) 2 H. & C. 121, 32 L. J. Ex. 217.

⁶ *Whitman v. Gibson* (1838) 9 Sim. 106, 47 R. R. 214, *Mann v. Stephen* 1846 15 Sim. 377, 74 R. R. 101.

⁷ 1848) 2 Ph. 774, 78 R. R. 280. See per Fry J. in *Luke v. Dennis* (1877) 7 Ch. D. 227, at 235, 236, 47 L. J. Ch. 174.

now the leading case on the subject. The most important of the subsequent cases are [*Elliston v. Reacher*,³ *L.C.C. v. Allen*⁴ and *Zetland (Marquess) v. Driver*]. When a vendor sells land in building lots and takes restrictive covenants in identical terms from the several purchasers, not entering into any covenant himself, it is a question of fact whether these covenants are meant to operate for the protection of purchasers as between themselves, or as against the vendor in his dealings with parcels retained by him.⁵ Where such is the intention, any purchaser can enforce the restriction against any other purchaser, or his assigns having notice, or the vendor as the case may be, nor can the vendor release the covenant to any purchaser or his successors in title without the consent of all the rest.⁶ An intruder who acquires a statutory title by adverse possession is in no better position than a purchaser with notice.⁷

The result of the equitable doctrine is in practice to enable a great number and variety of restrictions to be imposed on the use of land for an indefinite time, subject to the contingency of a pur-

³ [1908] 2 Ch. 665; 78 L. J. Ch. 87.]

⁴ [1914] 3 K. B. 642; 83 L. J. K. B. 1095.]

⁵ [1939] Ch. 1; 107 L. J. Ch. 316.]

Re Birmingham and District Land Co. and Allday [1893] 1 Ch. 342; 62 L. J. Ch. 90.

As to what is sufficient evidence of a "building scheme," *Tucker v. Fowler* [1893]

1 Ch. 195; 62 L. J. Ch. 172; *Osborne v. Bradley* [1903] 2 Ch. 446; 73 L. J. Ch. 49;

Reid v. Bickerstaff [1909] 2 Ch. 305; 78 L. J. Ch. 753; C. A.; [*Elliston v. Reacher*

(next note);] *Wille v. St. John* [1910] 1 Ch. 325; 79 L. J. Ch. 239; C. A. The

vendor's taking restrictive covenants and not reserving any part of the property is strong affirmative evidence, but his reservation of part is by no means conclusive the other way.

See *Spicer v. Martin* (1888) 12 App. Ca. 12, 23; 58 L. J. Ch. 309, per Lord Macnaghten

approving the statement of Hall V.-C. in *Renals v. Coughshaw*, 9 Ch. D. 125, 129;

Elliston v. Reacher [1908] 2 Ch. 374, in C. A. *ib.* 665; 77 L. J. Ch. 619; 78 L. J. Ch. 87;

Ives v. Brown [1919] 2 Ch. 314; 88 L. J. Ch. 373. [But the vendor can release the

covenant if the common covenants empower him to do so: *Elliston v. Reacher*

[1908] 2 Ch. at 674; *Ridley v. Lee* [1933] Ch. 591, 602; 104 L. J. Ch. 304; *Pearce*

v. Maryon-Wilson [1935] Ch. 188, 192; 104 L. J. Ch. 169.] See now the general

exposition of the doctrine in the *Union of London and Smith's Bank Conveyance case*

[1933] Ch. 611; 102 L. J. Ch. 241, C. A. *per Car.* (no building scheme, both

parties assigns). [The authorities were again reviewed in *Newman v. Real Estate*

Debtors Corporation, Ltd. (1939) 162 L. T. 183.] Note that the equitable obligation

between different purchasers is independent of the dates of their respective purchases.

As to the effect of a purchaser of lots in a building estate under a restrictive scheme

forming a "sub-scheme" by re-selling portions under new conditions, see *Knigh*

v. Simmonds [1896] 2 Ch. 294; 65 L. J. Ch. 583, C. A. [distinguished in *Lawrence*

v. South County Freeholds [1939] Ch. 656; 108 L. J. Ch. 236]. But the rule in *Tulk*

v. Moxhay does not extend to a case where the covenantee had no possession or other

interest in any land in respect of which the benefit of the covenant could be enjoyed:

L. C. C. v. Allen [1914] 3 K. B. 642; 83 L. J. K. B. 1695, C. A. (authorities disapproved).

Chambers v. Randall [1923] Ch. 419; 92 L. J. Ch. 227. It is of course impracticable

to pursue the details here. [Semble, the covenant must "concern or touch" the

whole of the land: *Re Ballard's Conveyance* [1937] Ch. 473; 106 L. J. Ch. 273, unless

expressed to be for the benefit of every part thereof, whereupon it may attach to

such parts as it does concern: *Zetland (Marquess) v. Driver* [1939] Ch. 1; 107

L. J. Ch. 316, where *Re Ballard* was distinguished; cf. 54 L. Q. R. (1938) 321-323.]

Nisbet & Potts' contract [1906] 1 Ch. 386; 75 L. J. Ch. 238, C. A. In this case an

equitable restriction is enforced against one who is in no way party or privy to

the transaction which created the original equity, and thus, as F. W. Maitland

said in one of the latest additions made by himself to his lectures, "a curious class

of negative easement is here created": Maitland, *Equity*, &c., Camb. 1909, 170

[ed. 1936, 167]. Nevertheless the decision seems inevitable.

chase for value without notice of the restriction* and also subject, as we shall immediately see, to a judicial discretion, now largely extended by statute, to grant relief where the circumstances are materially altered. But equity does not profess to enforce a restrictive covenant on a purchaser with notice as being a constructive party to the covenant; it only restrains him from using the land in a manner which would be unconscientious as depriving the covenantee of his effectual remedy.¹⁰ So far as common law remedies go, covenants of this kind can be always or almost always evaded; if the equitable remedy by injunction were confined to the original covenantor, that also could be evaded by a collusive assignment. On this principle, however, an assign cannot be and is not made answerable for the active performance of his predecessor's covenant: he can only be expected not to prevent its performance. Hence the decisions to that effect which have been cited.¹¹ The jurisdiction is a strictly personal and restraining one. No rule of the law of contract is violated, for the assign with notice is not liable on the contract but on a distinct equitable obligation in his own person. Lord Brougham fell into the mistake of supposing that the covenant must be operative in equity, if at all, by way of giving effect to an intention to impose permanent burdens unknown to the law. Equity does not trouble itself to assist intentions which have no legal merits, and any such action, Lord Brougham rightly saw, was beyond its proper province. The law laid down in *Keppel v. Bailey*¹² was erroneous on this point, not from any defect of reasoning in the judgment, but because the reasoning proceeded on an erroneous assumption.

DISCRETIONARY RELIEF FROM RESTRICTIONS

The true principle is further illustrated by the rule that even with notice an assign is not liable "where an alteration takes place through the acts or permission of the plaintiff or those under whom he claims, so that his enforcing his covenant becomes unreason-

* Where there has once been such a purchase, a subsequent purchaser cannot be affected by notice. See per Lindley I J 16 Q. B. Div. at 788, *Wilkes v. Spooner* [1911] 2 K. B. 473, 80 L. J. K. B. 1107, C. A.

¹⁰ "I do not think any covenant runs with the land in equity. The equitable doctrine is that a person who takes with notice of a covenant is bound by it": Rigby L. J. *Rogers v. Hosegood* [1900] 2 Ch. 388, 401; 69 L. J. Ch. 652, but in *Nisbet & Potts' contract*, note ³, it is said that a negative covenant of this kind does in some sense bind the land in equity: see [1906] 1 Ch. at 401, 405. An assignee with notice is in no better position than the original covenantor as to remedies: see *Achilles v. Tovell* [1927] 2 Ch. 243; 96 L. J. Ch. 493 (limits of the Court's discretion in awarding damages in lieu of injunction).

¹¹ See a note in L. Q. R. iv, 119 (not by the present writer) on *Hall v. Ewin* (1887), 36 W. R. 84; 37 Ch. Div. 74; 57 L. J. Ch. 95, where the doctrine is well explained: *Powell v. Hemsley* [1909] 2 Ch. 252, 78 L. J. Ch. 741, C. A.; *Smith v. Colbourne* [1914] 2 Ch. 533, C. A.

¹² (1834) 2 M. & K. 517, 39 R. R. 264. Other reasons with which we are not concerned here were given; the actual decision was perhaps also right on the ground that the covenant in question was not merely negative: see 39 R. R. 264, n.

able":¹² were the liability really on the covenant, nothing short of release or estoppel would avoid it. The Law of Property Act, 1925, (15 & 16 Geo. 5, c. 20), s. 84, has conferred on official arbitrators a large discretionary authority to discharge or modify restrictions of this kind on the use of land or buildings.¹³

The reader is once more warned, for abundant caution, that this book does not attempt to be a guide to the details of modern practice

¹² Fry, L.J. in *Sher v. Cauter* (1884) 28 Ch. Div. 103, 109, 72 L. J. Ch. 170, explaining the limits of the rule as originally laid down in *Duke of Bedford's Trustees v. British Museum* (1822) 2 M. & K. 552, 39 R. R. 288, (*Osborne v. Bradley* [1903] 2 Ch. 446, 73 L. J. Ch. 40).

¹³ See also the Land Registration Act, 1925, (15 & 16 Geo. 5, c. 21), s. 82. *Friden v. Byrne* [1926] 1 Ch. 620, 95 L. J. Ch. 445, and as to the exercise of discretion by the Court *Re Sunningfield* [1932] 1 Ch. 71, 101 L. J. Ch. 10, [*Re Spencer Flat* [1937] Ch. 86, 106 L. J. Ch. 175].

6

DUTIES UNDER CONTRACT

1. INTERPRETATION GENERALLY

WE have now gone through the general and necessary elements of a contract, and shall hereafter consider the further causes which may annul or restrain its normal effect. But disputes as to the validity of an agreement cannot be determined without first determining what the substance of the agreement is; and a dispute as to the original substance and force of a promise may often be resolved into a conflict on the less fundamental question of what is a sufficient performance of a promise admitted to be binding. A summary view of the leading rules of interpretation seems therefore desirable at this stage. We suppose an agreement formed with all the positive requisites of a good contract; and we proceed to ascertain what are the specific duties created by this agreement.

If there be not any special cause of exception, the promisor must fulfil the obligation which his own act has created. He must perform his promise according to its terms. Here there are two distinct elements of which either or both may be more or less difficult to ascertain: first the terms in which the promise was made, and then the true sense and effect of those terms. The former must be determined by proof or admission, the latter by interpretation, which, however, may have to take account of specific facts other than those by which the promise itself is established. We assume the terms to be reduced to a form in which the Court can understand them, as for example by translation from any language of which the Court does not assume judicial knowledge, or by explanation of terms of art in sciences other than the law, which is really a kind of translation out of the language of specialists.

EFFECT OF PROMISE

The nature of a promise is to create an expectation in the person to whom it is made. And, if the promise be a legally binding one, he is entitled to have that expectation fulfilled by the promisor. It has, therefore, to be considered what the promisor did entitle the promisee to expect from him. Every question which can arise on the interpretation of a contract may be brought, in the last resort, under this general form.

In order to ascertain what the promisee had a right to expect, we do not look merely to the words used. We must look to the state of things as known to and affecting the parties at the time of

the promise, including their information and competence with regard to the matter in hand, and then see what expectation the promisor's words, as uttered in that state of things, would have created in the mind of a reasonable man in the promisee's place and with the same means of judgment. The reasonable expectation thus determined gives us the legal effect of the promise.

Now this measure of the contents of the promise will be found to coincide in the usual dealings of men of good faith and ordinary competence, both with the actual intention of the promisor and with the actual expectation of the promisee. But this is not a constant or a necessary coincidence. In exceptional cases a promisor may be bound to perform something which he did not intend to promise, or a promisee may not be entitled to require that performance which he understood to be promised to him. The problem has been dealt with by moralists as well as by lawyers. Paley's solution is well known and has been quoted by text-writers and in Court "where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time that the promisee received it." But this does not exactly hit the mark. Reflection shows that without any supposition of fraud Paley's rule might in peculiar cases (and only for such cases do we need a rule) give the promisee either too much or too little. Archbishop Whately, a writer of great acuteness and precision within the limits he assigned to himself, perceived and corrected the defect. "Paley," he says "is nearly but not entirely right in the rule he has here laid down. Every assertion, or promise, or declaration of whatever kind, is to be interpreted on the principle that the right meaning of any expression is that which may be *fairly presumed to be understood* by it." And such is the rule of judicial interpretation as laid down and used in our Courts. "In all deeds and instruments"—and not less, when occasion arises, in the case of spoken words—"the language used by one party is to be construed in the sense in which it would be reasonably understood by the other." All rules of construction may be said to be more or less direct applications of this principle. Many rules of evidence involve it, and in particular its development in one special direction, extended from words to conduct, constitutes the law of estoppel *in pais*, which under somewhat subtle and tech-

¹ See per Blackburn J. *Smith v. Hughes* (1871) L. R. 6 Q. B. 597, 607; 40 L. J. Q. B. 221; *Burrell v. Dyer* (1884) 9 App. Ca. 345 (a Scottish appeal, there is no difference in the law).

² L. R. 6 Q. B. 600, 610.

³ Paley, *Moral Phil.* bk. 3, pt. 1, c. 5; Whately thereon in notes to ed. 1859. I am indebted to my learned friend Mr. A. V. Dicey for calling my attention to Whately's amendment. Austin's attempt (*Jurisprudence*, i, 456, ed. 1869) is nothing to the purpose. Some modern civilians have said, with useless subtlety, that a promisor who has by his own fault caused the promisee to expect more than was meant is bound "non ex vi promissionis sed ex damno per culpam dato."

⁴ Blackburn J. in *Foulkes v. Manchester and London Assurance Association* (1869) 3 B. & S. 917, 929; 32 L. J. Q. B. 153, 159; 129 R. R. 607, 614.

nical appearances is perhaps the most complete example of the power and flexibility of English jurisprudence.

PAROL VARIATIONS

We have already seen that the terms of an offer or promise may be expressed in words written or spoken, or conveyed partly in words and partly by acts, or signified wholly by acts without any use of words.⁴ For the purposes of evidence, the most important distinction is not between express and tacit significations of intention, but between writing and all other modes of manifesting one's intent. The purpose of reducing agreements to writing is to declare the intention of the parties in a convenient and permanent form, and to preclude subsequent disputes as to what the terms of the agreement were. It would be contrary to general convenience, and in the great majority of cases to the actual intention of the parties at the time, if oral evidence were admitted to contradict the terms of a contract as expressed in writing by the parties. Interpretation has to deal not with conjectured but with manifest intent, and a supposed intent which the parties have not included in their chosen and manifest form of expression cannot, save for exceptional causes, be regarded. Our law, therefore, does not admit evidence of an agreement by word of mouth against a written agreement in the same matter. The rule is not a technical one, and is quite independent of the peculiar qualities of a deed.⁵ "The law prohibits generally, it not universally, the introduction of parol evidence to add to a written agreement, whether respecting land, or to vary it." "If A. and B. make a contract in writing, evidence is not admissible to show that A. meant something different from what is stated in the contract itself, and that B. at the time assented to it. If that sort of evidence were admitted, every written document would be at the mercy of witnesses that might be called to swear anything."⁶

Under normal conditions the same rule prevails in equity, and this in actions for specific performance as well as in other proceedings, and whether the alleged variation is made by a contemporaneous⁷ or a subsequent⁸ verbal agreement. "Variations, verbally agreed upon, . . . are not sufficient to prevent the

⁴ Pp. 8—9.

⁵ Those qualities are of course much abridged since the Judicature Acts by the universal application of rules of equity; that accord and satisfaction is now a good defence to an action on a deed, see *Berry v. Berry* [1929] 2 K. B. 316; 98 L. J. K. B. 748.

⁶ *Martin v. Pycroft* (1852) 2 D. M. G. 785, 795; 22 L. J. Ch. 94; 95 R. R. 324, 330. For the earlier history, see Wigmore, in Col. Law Rev. iv, 338.

⁷ Per Pollock C.B. *Nichol v. Godts* (1854) 10 Ex. 191, 194; 23 L. J. Ex. 314; 102 R. R. 523, 536. See also *Hotson v. Browns* (1860) 9 C. B. N. S. 442; 30 L. J. C. P. 106; *Halhead v. Young* (1856) 6 E. & B. 312; 25 L. J. Q. B. 290; 106 R. R. 615.

⁸ *Omerod v. Hardman* (1801) 5 Ves. 722, 730. Lord St. Leonards (V. & P. 163) says this cannot be deemed a general rule: but see *Hill v. Wilson*, L. R. 8 Ch. 888; per Mellish L.J. at 899; 42 L. J. Ch. 817.

⁹ *Price v. Dyer* (1810) 17 Ves. 356; 11 R. R. 102; *Robinson v. Page* (1826) 3 Russ. 114, 121; 27 R. R. 26.

execution of a written agreement, the situation of the parties in all other respects remaining unaltered."¹¹

Here variation must not be confused with rescission.¹² There is no rule that an agreement in writing can be discharged only in writing or by the special form (if any) required by the Statute of Frauds or the like for the principal agreement. Parol rescission even by an agreement which, as such is unenforceable for a defect of form (or, very rarely, by the expressed will of the parties that it shall not create any legal obligation)¹³ will be good if"—though only if"—there appears a clear intention to rescind at all events.

Correction of an admitted error in detailed matter of description, such as the number of a house, is not a variation.¹⁴

Similarly, when a question arises as to the construction of a written instrument *as it stands* parol evidence is not admissible (and was always inadmissible in equity as well as at law) to show what was the intention of the parties. A vendor's express contract to make a good marketable title cannot be modified by parol evidence that the purchaser knew there were restrictive covenants.¹⁵ It is otherwise where it is sought to *rectify* the instrument under the peculiar equitable jurisdiction which will be described in a later chapter. And therefore the Court has in the same suit refused to look at the same evidence for the one purpose and taken it into account for the other.¹⁶

It is no real exception to this rule that though "evidence to vary the terms of an agreement in writing is not admissible," yet "evidence to show that there is not an agreement at all is admissible," as when the operation of a writing as an agreement is conditional on the approval of a third person¹⁷ or on something to be done by the other party.¹⁸ A written contract not under seal is not the contract itself, but only evidence—the record of the contract. When the parties have recorded their contract the rule is that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, and so make the written document conclusive evidence between them. But it is always open to the parties

¹¹ *Price v. Dyer* (1810) 17 Ves. at 364, 11 R. R. 107, (*Cloues v. Higginson* (1813) 1 Ves. & B. 524, 12 R. R. 284, where it was held (1) that evidence was not admissible to explain, contradict, or vary the written agreement, but (2) that the written agreement was too ambiguous to be enforced).

¹² [See Goddard J.'s examination of some of the authorities in *Bussell Wachtler Glover & Co. v. South Derwent Coal Co., Ltd.*, [1938] 1 K. B. 408, 107 L. J. K. B. 365.]

¹³ *Rose and Frank Co. case* [1925] A. C. 445, 94 L. J. K. B. 120, see p. 3.

¹⁴ *Morris v. Baron* [1918] A. C. 1, 87 L. J. K. B. 145.

¹⁵ *Noble v. Ward* (1867) L. R. 2 Ex. 145, Ex. Ch. as explained in *Morris v. Baron*. If the variation amounts to a new contract in such a case, its validity is a matter of form and the words of the statute, mere discharge of the old contract is a matter of intention. per Lord Sumner, *British and Beningtons v. A. W. Cachar Tea Co.* [1923] A. C. 48, 69; 92 L. J. K. B. 62.

¹⁶ *Forgione v. Lewis* [1920] 2 Ch. 326, 89 L. J. Ch. 510.

¹⁷ *Cato v. Thompson* (1882) 9 Q. B. Div. 616. In such a case the true intention may well be that the vendor shall remove the defect.

¹⁸ *Bradford v. Romney* (1862) 30 Beav. 431, cp per Lindley L. J. 9 Q. B. Div. 620.

¹⁹ *Pym v. Campbell* (1856) 6 E. & B. 370, 374, 25 L. J. Q. B. 277; 106 R. R. 632, 635.

²⁰ *Pattis v. Hornbrook* [1897] 1 Ch. 25, 66 L. J. Ch. 144.

to shew whether or not the written document is the binding record of the contract."²¹

"The rules excluding parol evidence have no place in any inquiry in which the Court has not got before it some ascertained paper beyond question binding and of full effect."²² It may even be shown that what appears to be a deed was delivered as an escrow, notwithstanding that a deed once fully delivered is conclusive.²³ Still less does the rule apply to proof of the circumstances in which a document was signed which was not really part of the agreement at all, but only a memorandum made at the same time or immediately after.²⁴

So in *Jervis v. Berridge*²⁵ it was held that a document purporting to be a written transfer of a contract for the purchase of lands "was . . . not a contract valid and operative between the parties but omitting (designedly or otherwise) some particular term which had been verbally agreed upon; but was a mere piece of machinery . . . subsidiary to and for the purposes of the verbal and only real agreement." And since the object of the suit was not to enforce the verbal agreement, nor "any hybrid agreement compounded of the written instrument and some terms omitted therefrom," but only to prevent the defendant from using the written document in a manner inconsistent with the real agreement, there was no difficulty raised by the Statute of Frauds, 1677 (29 Car. c. 3), "which does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties." If it appears that a document signed by the parties, and apparently being the record of a contract, was not in fact intended to operate as a contract, then "whether the signature is or is not the result of a mistake is immaterial."²⁶

Again it has been held, and that by Courts of common law not having equity jurisdiction, that even where there is an agreement by deed a collateral agreement not inconsistent with the written terms may be shown. For such a collateral agreement, moreover, the promisee's execution of the principal writing or deed is consideration enough,²⁷ in the same way as on a sale of goods no

²¹ Per Bramwell B. *Wake v. Harrop* (1861-2) 6 H. & N. at 775; 30 L. J. Ex. at 277; see S. C. in Ex. Ch. 130 R. R. 461, and cp. *Wace v. Allen* (1888) 128 U. S. 590.

²² *Guardhouse v. Blackburn* (1866) L. R. 1 P. & D. 109, 115; 35 L. J. P. 116. And see *Wood V.-C. in Druff v. Lord Parker* (1868) L. R. 5 Eq. 131, 137; 37 L. J. Ch. 241.

²³ See *Watkins v. Nash* (1875) L. R. 20 Eq. 262; *Whelan v. Palmer* (1888) 39 Ch. D. 648, 655; 57 L. J. Ch. 784.

²⁴ *Bank of Australasia v. Palmer* [1897] A. C. 540; 66 L. J. P. C. 105, J. C.

²⁵ (1873) L. R. 8 Ch. 351, 359, 360; 42 L. J. Ch. 518; *Clarke v. Grant* (1807) 14 Ves. 519; 9 R. R. 336, appears really to belong to this class.

²⁶ Per Bramwell B. *Rogers v. Hadley* (1863) 2 H. & C. 227, 249; 32 L. J. Ex. 241; 133 R. R. 652. In this case there was "a real contract not in writing and a paper prepared in order to comply with some form, which was stated at the time to contain a merely nominal price." Cp. *Bank of Australasia v. Palmer*, note ²⁴.

²⁷ *Erskins v. Adams* (1873) L. R. 8 Ch. 756; 42 L. J. Ch. 835; *Morgan v. Griffith* (1871) L. R. 6 Ex. 70; 40 L. J. Ex. 46 (agreement by lessor to keep down rabbits); *Angell v. Duke* (1875) L. R. 10 Q. B. 174 (agreement to do repairs and send in furniture); see [1901] 2 K. B. at 223; *De Lassalle v. Guildford* [1901] 2 K. B. 215; 70 L. J. K. B. 533, C. A. (warranty of drains in good order).

distinct consideration is required for a simultaneous collateral warranty. In cases of this kind the facts may be such as to make it a nice question but not material to the result, whether there are a principal and a collateral contract or two instruments to be construed together as an entire contract."

EVIDENCE AS TO SPECIAL SENSE OF WORDS

Another class of cases in which an apparent, or sometimes, perhaps, a real exception occurs, is that in which external evidence is admitted to explain the meaning in which particular terms in a contract were understood by the parties, having regard to the language current in that neighbourhood or among persons dealing in that kind of business. Witnesses have been allowed in this way, to prove that by local custom 'a thousand' of rabbits was 1200 (*i.e.*, ten long hundred and six score each, the old 'Anglicus numerus' of Anglo-Norman surveys)" to show what was meant by weekly accounts among builders 'to define year' in a theatrical contract to pay a weekly salary for three years as meaning only the part of the year during which the theatre was open," to identify the wool described as 'your wool' in a contract to buy wool."

The theory is that such evidence is admitted not to contradict a document but to explain the words used in it supply as it were the mercantile dictionary in which you are to find the mercantile meaning of the words which are used " (or other meaning received by persons in the condition of the parties as the case may be). The process may be regarded as an extension of the general rule that words shall have their primary meaning. For when words are used by persons accustomed to use them technically the technical meaning is for those persons at any rate the primary meaning. It is a question not of adding or altering but of identifying the subject-matter. Suppose that I sell 'all my wool which I have on Dale Farm' evidence must always be admissible to show that the wool which was delivered was the wool on Dale Farm. The terms thus explained need not be ambiguous on their face. Parol evidence is equally admissible to explain words in themselves ambiguous or obscure and to show as in the case of 'a thousand of rabbits', that common words were used in a special sense.

Jacob v. Batavia and General Plantations Trust [1924] 1 Ch. 217, aff'd [1924] 2 Ch. 291, 93 L. J. Ch. 20.

¹⁹ *Smith v. Wilson* (1832) 3 B. & Ad. 728, 37 R. R. 536.

²⁰ *Myers v. Sarl* (1860) 3 F. & E. 306, 30 L. J. Q. B. 9.

²¹ *Grant v. Maddox* (1846) 15 M. & W. 717, 16 L. J. Ex. 227, 71 R. R. 815.

²² *Macdonald v. Longbottom*, Ex. Ch. 1850-60, 1 L. & E. 977, 28 L. J. Q. B. 293, 29 ib. 256.

²³ *Lord Cairns Bowes v. Shand* (1877) 2 App. Cas. 455, 468.

²⁴ See *Elphinstone, Norton and Clark on Interpretation*, 48, 57, and Sir Howard Elphinstone on "The Limits of Rules of Construction," 1. Q. R. 1, 466.

²⁵ *Erle J. in Macdonald v. Longbottom* (1859-60) 28 L. J. Q. B. at 297, (p. *Bank of New Zealand v. Simpson* [1900] A. C. 182, 69 L. J. P. C. 22, J. C.).

²⁶ See the judgment of Blackburn J. in *Myers v. Sarl*, note ²⁰.

"The duty of the Court . . . is to give effect to the intention of the parties. . . . It has always been held . . . that where the terms in the particular contract have besides their ordinary and popular sense, also a scientific or peculiar meaning, the parties who have drawn up the contract with reference to that particular department of trade or business must fairly be taken to have intended that the words should be used not in their ordinary but in their peculiar sense."³⁷

This kind of special interpretation must be kept distinct from the general power of the Court to arrive at the true construction of a contract by taking account of the material facts and circumstances proved or judicially known. The words "warranted no St. Lawrence" in a time policy of marine insurance have been decided, by reason of the known facts of geography and the nature and risks of the navigation, to include the Gulf of St. Lawrence as well as the river, notwithstanding the failure of an attempt to prove that such was the customary meaning.³⁸ In another modern case the Court found no difficulty in holding that, in the circumstances of the transaction, a guaranty for the price of goods to be supplied, definite as to the amount but otherwise loosely worded, must be read as a continuing guaranty and not as a guaranty confined to a single sale then about to be made.³⁹

CUSTOMARY TERMS.

The Courts have taken yet a further step in this line of interpretation by reference to unexpressed matter. Not only particular terms may be explained, but whole new terms (provided they be not inconsistent with the terms actually expressed in writing) may be added by proving those terms to be an accustomed part of such contracts, made between such persons, as the Court⁴⁰ has before it. Custom, when the word is used in these cases, does not necessarily imply either antiquity or universality or any definite local range. It is merely a usage so general and well understood in fact, with reference to the business, place, and class of persons, that the parties are presumed to have made their contract with tacit reference to it, and to have intended to be governed by it in the same way and to the same extent as other like persons in like cases. The Court may act, it seems, on a proved change of usage within recent memory.⁴¹ It might perhaps be better not to use in this connexion the word "custom," which has a perfectly distinct meaning in the

³⁷ Cockburn, C.J. in *Myers v. Sarl* (1860) 30 L. J. Q. B. at 12.

³⁸ *Burrell v. Dryer* (1884) 9 App. Ca. 345. In *Johnson v. Raylton* (1881) 7 Q. B. Div. 448; 50 L. J. Q. B. 753, an implied warranty alleged to be customary was decided to be part of the general law.

³⁹ *Heffield v. Meadows* (1869) L. R. 4 C. P. 595.

⁴⁰ An arbitrator authorized generally to decide disputes arising out of a contract has power to decide any question as to the existence of an applicable custom of trade; *Produce Brokers' Co. v. Olympia, &c. Co.* [1916] 1 A. C. 314; 85 L. J. K. B. 160.

⁴¹ See per Channell J. in *Mould v. Halliday* [1898] 1 Q. B. at 130.

law of tenure and rights over land, or at least to speak by preference of "usage," except where the phrase "custom of trade" has become too familiar to be easily dropped. It would take us too far to enlarge upon this class of cases; it must suffice to indicate them and refer to a few leading authorities.

Rights allowed to agricultural tenants by the "custom of the country," such as to take the away-going crop after the expiration of the term, to receive compensation for particular kinds of improvement, and the like, have been held for more than a century⁴¹ not to be excluded by anything short of actual contradiction in the terms expressed between the parties, and this even where the contract is under seal. In modern cases of this class⁴² the question has generally been whether something in the express terms was or was not so inconsistent with the usage as to exclude the presumption that "the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."⁴³

Within the last century or so there have been a great number of decisions arising out of the usages current in trades and in various kinds of mercantile dealings and public employments. One strong application of the principle now before us has been to make agents or brokers in certain trades and markets personally liable (unconditionally or in some particular event) notwithstanding that they contracted only as agents.⁴⁴ This has been thought to go too far, as adding to the written contract not merely a new term as between the same parties, but a new party. But the point is settled by an unbroken current of authority.⁴⁵ Some important groups of cases have turned on particular rules and usages of the Stock Exchange, with regard especially to the determination of the persons on whom they were binding without individual assent or notice.⁴⁶

[A usage can arise only from continuity of dealings and it is not enough that only one party to the contract knew of the usage in question; the other party must either know of it also or be presumed to know of it because of its being generally well known in the trade.^{47a}]

As it is not always easy to say where the ordinary construction of the language used in affairs ends, and explanation of special

⁴¹ The earliest case commonly cited is *Wigglesworth v. Dallison* (1778-81) Dougl. 201; 1 Sm. L. C. 528, where see the notes.

⁴² As in *Tucker v. Linger* (1883) 8 App. Ca. 508; 52 L. J. Ch. 941. See per Lord Blackburn, 8 App. Ca. at 511.

⁴³ Parke B. in *Hutton v. Warren* (1836) 1 M. & W. 466, 475; 46 R. R. 368, 377. For a recent example not without difficulty, see *Walkers Winsor & Hamm and Shaw, Son & Co.* [1904] 2 K. B. 152; 73 L. J. K. B. 325.

⁴⁴ *Humphrey v. Dale* (1857) E. B. & E. 1004; 26 L. J. Q. B. 137, followed in *Field v. Lelan* (1861) 6 H. & N. 617; 30 L. J. Ex. 168, itself a pretty strong case; and other cases cited pp. 82-83.

⁴⁵ See 1 Sm. L. C. (13th ed. 1929) 613-615.

⁴⁶ See *Nickalls v. Merry* (1875) L. R. 7 H. L. 530.

^{47a} [*Forras v. Scottish Flax Co., Ltd.* [1943] 2 All E. R. 366 (C. A.).]

terms and senses by a "mercantile dictionary" as Lord Cairns called it," begins, so there is a more or less fluctuating boundary line, even now that the law merchant is part of the general law, between the establishment, by evidence of usage, of particular incidents of particular mercantile contracts, and the general development of mercantile law by the judicial recognition of universal custom.

CONSTRUCTION ACCORDING TO GENERAL INTENTION

Supposing the terms of the contract, express or incorporated by reference, to be finally established, there remains the task of construction in the stricter sense; namely of deciding, where the terms are capable of more than one meaning, which meaning is to be preferred. On this head there are few rules, if any, which are confined to contracts, or are more applicable to them than to instruments in writing generally. The one universal principle is that effect is to be given to the intention of the parties collected from their expression of it as a whole. It must be collected from the whole; that is, particular terms are to be construed in that sense which is most consistent with the general intention.⁴⁰ It must also be collected from what is expressed not from a mere conjecture of some intention which the parties may have had in their minds, and would have expressed if they had been better advised.⁴¹ This caution, however, does not prevent the correction of mistakes which are obvious on the face of the document. In such cases the general intent, as expressed by the immediate context, or collected from the whole scope of the instrument, is clear enough to overcome the difficulty arising from erroneous or defective expression in some part. Mere verbal blunders have always, in modern times at any rate, been corrected without difficulty by the ordinary jurisdiction even of Courts of common law.⁴² *Mala grammatica non vitiat chartam*.⁴³ In construing instruments of well-known types, such as family settlements, even omitted clauses have often been supplied by the aid of the context.⁴⁴

⁴⁰ P. 194.

⁴¹ See *Ford v. Brech* (1848) 1 L. Ch. 111 Q. B. 852, 17 L. J. Q. B. 114.

⁴² *Jessel M.R. Smith v. Lucas* (1881) 18 Ch. D. 531, 542; and see other authorities in *Elphinstone, Norton and Clark on Interpretation*, 37.

⁴³ See per Lord Mansfield, 3 Burr. 1635, and *Doe d. Leach v. Mickleth* (1805) 6 East, 486; Lord St. Leonards, *Wilson v. Wilson* (1854) 5 H. L. C. 40, 66; 23 L. J. Ch. 697; 101 R. R. 25, 41. Sugd. V. & P. 171.

⁴⁴ See *Shepp. Touchst.* 55, 87, 369.

⁴⁵ *Cropton v. Davies* (1869) L. R. 4 C. P. 159; 38 L. J. C. P. 159; *Savage v. Tyers* (1872) L. R. 7 Ch. 356; *Daniel's Settlement* (1875) 1 Ch. Div. 375; 45 L. J. Ch. 105; *In re Bird's Trusts* (1876) 3 Ch. D. 214; *Greenwood v. Greenwood* (1877) 5 Ch. Div. 954; 47 L. J. Ch. 298; *Refsdern v. Bryning* (1877) 6 Ch. D. 133; as to deciding on conflict in the terms of a lease by reference to the counterpart, *Burchell v. Clark* (1876) 2 C. P. Div. 88; 46 L. J. C. P. 115. Sometimes it is not easy to decide whether the doctrine of *falsa demonstratio* suffices, or recourse must be had to the equitable jurisdiction to rectify an instrument on the ground of common mistake (Ch. 9, Part III, p. 403): see *Coven v. Truett*, Ltd. [1899] 2 Ch. 309; 68 L. J. Ch. 563, C. A.

For the rest, our Courts are now much less disposed to hold themselves bound by canons of construction than they were even one or two generations ago. "They were framed with a view to general results, but are sometimes productive of injustice by leading to results contrary to the intention of the parties";⁶⁴ and the recent tendency is to pay less attention to any such rules and more to all admissible indications of what the intention actually was in the case in hand including the practical construction of the contract by the conduct of the parties themselves.⁶⁵ It will be remembered that a rule which does not yield to sufficient evidence of contrary intention is not a rule of construction at all, but a rule of law.⁶⁶ Again, many rules of construction are in truth more auxiliary than explanatory, their purpose is to supply the guidance required for dealing with events for which the parties have omitted to provide. In the language of Willes J. disputes arise not as to the terms of the contract, but as to their application to unforeseen questions, which arise incidentally or accidentally in the course of performance and which the contract does not answer in terms yet which are within the sphere of the relation established thereby, and cannot be decided as between strangers.⁶⁷ The parties may really have taken no thought and therefore had no intention at all with respect to those events, and yet something must be done. In such cases any rule not inconsistent with justice is better than uncertainty and it matters little whether the reasons originally assigned for an established rule be convincing or not. Among rules or maxims of construction some are much weaker than others and are entitled as it were only to a casting vote. Such is that which says that words are to be taken in case of doubt against the person using them, a maxim to which Sir G. Jessel denied even a subsidiary value,⁶⁸ but which is in substance classical⁶⁹ and seems reasonable, and on the whole stands approved on condition of being used to turn the scale where there is real doubt, not to force a less natural meaning on words which have a more natural one.⁷⁰

ARTIFICIAL RULES

There are artificial rules of construction in particular cases which stand apart from the ordinary principles, they are derived chiefly, but not wholly, from the jurisdiction of the Court of

⁶⁴ Cockburn C.J. 2 C. P. Div. at 93.

⁶⁵ See *D. C. v. Calliher* 1888 124 U. S. 505.

⁶⁶ F. V. Hawkins on the Construction of Wills Preface.

⁶⁷ *Lloyd v. Guibert* (1865) Ex. Ch. 1 E. R. 1 Q. B. 115, 120, 35 L. J. Q. B. 74. See the next chapter for the modern extension of this principle to conditions affecting the whole of the contract.

⁶⁸ *Taylor v. Corporation of St. Helens* 1877) 6 Ch. Div. 264, 270.

⁶⁹ Papinian in D. 2. 14, de pactis, 39. Veteribus placet partitionem obscuram vel ambiguum venditori, et qui locavit, nocere, in quorum fuit potestate legem apertius conscribere.

⁷⁰ Elphinstone, Norton and Clark, *op. cit.* 93. Lord Selborne in *Will v. Duke of Devonshire* (1882) 8 App. Cas. at 149, states it in a guarded form.

Chancery, and in their origin did not profess to be consistent with the expressed intention of the parties. To some extent they went upon a presumed real intention, but the presumption was rather of what the Court thought the parties ought to have intended than of what it thought they did intend.⁶¹ They were in truth rules of positive restriction, imposed by a policy which was then in the hands of the judges, but is now held to be in the exclusive competence of the Legislature, and for the purpose of making the substance of the transaction conform to the requirements of fair dealing as understood by the Court. Our Courts have long ceased to dictate to parties of full age and with the means of independent judgment on what terms they shall contract, but certain forms and terms have had an artificial meaning firmly impressed on them. The modern justification of such rules is that they are well known, and parties using the accustomed forms do in fact know and expect that their words will be construed in that sense which, by the standing practice of the Courts, has become a received and settled technical sense.⁶²

Policies of marine insurance are to this day made in a form which on the face of it is clumsy, imperfect, and obscure. But the effect of every clause and almost every word has been settled by a series of decisions, and the common form really implies a whole body of judicial rules, "which originated either in decisions of the Courts upon the construction or on the mode of applying the policy, or in customs proved before the Courts so clearly or so often as to have been long recognized by the Courts without further proof. Since those decisions, and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are part of the contract."⁶³

The rules applied to restrain the effect of releases in general terms, of stipulations as to time, and of penal clauses, had a different origin, but have been brought round to rest on similar reasons. They are now admitted to be rules of construction which the parties can supersede, if so minded, by the adequate expression of a different intention. Still, they preserve traces of their history, and so lead up to the methods by which equity jurisdiction has dealt, and still deals, with cases of real mistake in expressing an agreement; and in that connexion we shall find it useful to return to them.

⁶¹ Cp. *Lindley L. J.* 21 Ch. Div. at 274.

⁶² See per *Jessel M.R.* *Wallis v. Smith* (1882) 21 Ch. Div. 243, 254; 52 L. J. Ch. 145.

⁶³ *Cf.* per *Brett L.J.* *Lohre v. Atchison* (1878) 3 Q. B. Div. 558, 562. [The Marine Insurance Act, 1906 (6 Ed. VII. c. 41), embodies the leading principles which, down to that Act, were contained in judicial decisions. The leading monograph on the topic is *Arnould, Marine Insurance* (12th ed. 1939).]

2. ORDER AND MUTUALITY OF PERFORMANCE

When a contract consists in mutual promises which on one or both sides are not to be completely performed at one time, and a party who has not performed the whole of his own obligation complains of a failure on the other side, questions arise which may be of great difficulty. How far is the plaintiff bound to show performance of the contract on his own part, or readiness and willingness to perform? Or, to look at it from the other side, how far will a failure of one party to fulfil some part of his duties under the contract have the effect of discharging the other party from further performance or the offer thereof on his part? Such cases have been of increasing frequency and importance in recent times, especially with regard to contracts for delivery and payment by instalments. To a certain extent the difficulty is one of interpretation, for the modern decisions at any rate endeavour to find a solution in accordance with the true intent of the parties, although the difficulty is much increased by the general want of any specific evidence of that intent. Most contracts are originally made in good faith and the parties do not necessarily, perhaps they do not usually, expect that all or any of the promises contained in the contract will be broken, or contemplate in any distinct way what will be the consequences of a breach.

From Lord Mansfield's time to the present attempts have been made to lay down rules for determining in the absence of express provisions or other clear indication of intent "the relation of one party's obligation to the other as regards the order of performance of mutual promises and the extent to which either is bound to accept performance of part notwithstanding failure to perform other part. In the earlier decisions the Courts inclined to treat the several terms of a contract, unless expressed to be dependent on the other party's performance" as separate and independent promises, paying little regard to the effect which default in some or one of them might produce in defeating the purpose of the contract as a whole. At this day the tendency is the other way.

The court looks to the purpose and effect of the contract as a whole as a guide to the probable intentions of the parties," and the presumption, if any there be, is that breach or default in any material term of a contract between men of business amounts to default in the whole.

COMMON TERMS

Certain terms which constantly recur in the authorities must be well understood and distinguished.

¹¹ *Cp. Leake*, (8th ed. 1931) 473-512 (chapter on "The Promise").

¹² 15 H. VII. 10, pl. 17.

¹³ *Bradford v Williams* 1872, L. R. 7 Ex. 259, 41 L. J. Ex. 259, see judgment of Martin B.

Promises or covenants are said to be *independent* when, although they be mutual, breach of any of them gives the other party a right of action without showing performance on his own part."

They are said to be *dependent* where "the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant."

Where one party cannot sue for breach of the other's promise without showing on his own part performance of some promise made by himself, or at least readiness and willingness to perform it, there, if the performance on his part was due before the other party's, it is said to be a *condition precedent* to his right of action."

If the fulfilment of mutual promises is due at the same time, and so that the party suing must be at least ready and willing to perform his part, it may be said that these are *concurrent conditions*. "Neither is a condition precedent," but "the performance of each is conditional upon the other's being performed at the same time.""

A contract which can be fulfilled only as a whole, so that failure in any part is failure in the whole, is said to be entire. A contract of which the performance can be separated, so that failure in one part affects the parties' rights as to that part only, is said to be divisible.

It must be always understood that questions of this kind are possible only where a contract consists of mutual promises. For if performance itself is the consideration for a promise, there is no contract at all without performance. But when there is a contract made by mutual promises, we may have to enquire whether, in addition to each promise or set of promises being the consideration for the other, the performance thereof on the one side is not a condition precedent or concurrent, of the right to claim performance on the other. There is no logical reason why it should not be so, or why express words should be required to manifest an intention that it should. Each party's promise is the consideration for the promise of the other, not for the performance which is due by reason of the promise. What are the terms and conditions of the duty created by the promise is another matter. In an executory contract of sale the promise to deliver is the consideration for the promise to pay; but this need not be a promise to pay before or without delivery. However, the earlier line of decisions was biassed by rules laid down in cases on promises by deed before the law of executory simple contracts was developed; and for a long time it was supposed that promises which were the consideration for each

⁶⁷ Lord Mansfield in *Kingston v. Preston* (1773) cited in *Jones v. Barkley* (1781), 2 Doug. 689; Finch, Sel. Ca. (2nd ed.) 735.

⁶⁸ See *Bankart v. Bowers* (1866) L. R. 1 C. P. 484; *Norrington v. Wright* (1885) 115 U. S. 189.

⁶⁹ Langdell, Summary, § 132. [American law is more fully treated in Williston, *Contracts*, §§ 860—887.]

other must, as a matter of law, be independent." Late in the eighteenth century this view was abandoned, and it was held that "whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done" so that "if one party covenant to do one thing in consideration" of the other party's doing another, each must be ready to perform his part of the contract at the time he charges the other with non performance.

Generally the order in which the several things are to be done is the test most readily applicable, accordingly, it is said that if a day be appointed for payment of money or part of it or for doing any other act and the day is to happen or may happen before the thing which is the consideration of the money (or other act) is to be performed, an action may be brought for the money (or for not doing such other act) *before* performance. But this is really no more than a rule of interpretation it only professes to give the result of the intention of the parties the reason given for it is that it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. Therefore the rule like all rules of its kind, must yield to evidence of a different intention, and where it is clear that the intention was to rely on the performance of the condition and not on the remedy, the performance is a condition precedent.

Another test often applied is whether the term of the contract in which default has been made goes to the whole of the consideration, or only to part, in other words whether the importance of that term with regard to the contract as a whole is or is not such that performance of the residue would be not a defective performance of that which was contracted for, but a total failure to perform it. Can it be said that the promisee gets what he bargained for, with some shortcoming for which damages will compensate him, or is the point of failure so vital that his expectation is in substance defeated? The necessity of dealing with this question as a whole was perhaps obscured to some extent by the requirements of formal pleading, but it has been strongly asserted in all the recent authorities

⁷⁰ See Langdell § 140 and the whole title of *Dependent and Independent Covenants and Promises*, and notes to *Portage v. Cole*, 1 Wms Saund 549. A revised version of Langdell's rules may be seen in Ashlev on Contracts Boston, Mass 1911, at 164, 202. [See too Williston, Contracts §§ 860, 887.]

⁷¹ The word "consideration" is here used in an elliptical manner, and not quite accurately. The promises are the consideration and the only consideration, for each other. But if the substance of the promises is that performance shall be exchanged for performance, neither party can demand performance on any other terms.

⁷² *Morton v. Lamb* (1747) 7 L. R. 125, 4 R. R. 395, per Lord Kenyon C. J. and Grose J.

⁷³ Cp. Clark Hare on Contracts, 589.

⁷⁴ Wms Saund 551, Jervis C. J. in *Roberts v. Brett* (1856) 18 C. B. 373, 25 L. J. C. P. 280, 286.

⁷⁵ Jervis C. J. *loc. cit.*

⁷⁶ It cannot be said that it was overlooked see *Withers v. Reynolds* (1831) 2 B. & Ad. 882, 36 R. R. 782, *Franklin v. Miller* (1846) 4 A. & E. 599, both long before the Common Law Procedure Act.

"Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently express such an intention, it will not be a condition precedent."

"And in the absence of such an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Parke B. to be acknowledged," see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent."⁷⁷

The agreement sued on in the case where the principle was thus declared was an opera singer's engagement. The singer, who was plaintiff in the cause, was to sing in concerts as well as operas, and during a period of a year, beginning three months before the active duties of the engagement, he was not to sing out of the theatre in the United Kingdom (in the opera season, or within fifty miles of London) without the defendant's permission. He was also to be in London for rehearsals six days before the commencement of the engagement. This last term was not fulfilled, but it was held that, having regard to the whole scope of the agreement, it did not go to the root of the matter so as to justify the defendant in determining the engagement and refusing to employ the plaintiff. Matter of excuse was alleged by the plaintiff for his failure to arrive at the time stipulated, but nothing turned upon this. On the other hand wrongful dismissal of an employee is a total repudiation of the contract of service, and discharges him not only from further service but from an undertaking restraining his right to carry on a similar business after the termination of the contract."

If, however, there be any presumption either way in the modern view of such cases, it is that, in mercantile contracts at any rate, all express terms are material. "Merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance."⁷⁸ In a case not mercantile, where the contract before the Court was held on its terms to be divisible, Lord Justice Mellish said:—

⁷⁷ In *Craus v. Legg* (1854) 4 Ex. at 716; 23 L. J. Ex. 228; 96 R. R. 936 [applied by the C. A. in *Huntton Co. v. Kolyon* (Incorporated) [1930] 1 Ch. 528; 99 L. J. Ch. 321].

⁷⁸ Blackburn J. *Bettini v. Gye* (1876) 1 Q. B. D. 183, 187, 188; Finch, Sel. Ca. 742, 745. *General Billposting Co. v. Atkinson* [1909] A. C. 118; 78 L. J. Ch. 77.

⁷⁹ Lord Cairns in *Bowes v. Shand* (1877) 2 App. Ca. 455, 463.

"I quite agree that as a general rule all agreements must be considered as entire. Generally speaking, the consideration for the performance of the whole and each part of an agreement by one party to it is the performance of the whole of it by the other, and if the Court is not in a position to compel the plaintiff, who comes for specific performance, to perform the whole of it on his part, the Court will not compel the defendant to perform his part or any part of the agreement. As a general rule, therefore, an agreement is entire. I can also conceive that a Court of Equity might treat an agreement as entire even in cases where a court of law would say that the performance of one part is not a condition precedent to the performance of the other part, because the Court might see that those rules as to conditions precedent, which to a certain extent are technical, might not meet the real justice of the case. But, on the other hand, I do not find it laid down anywhere that it is impossible for the parties so to frame an agreement that there may be a specific performance of part."

The question to what extent, if at all, a party is bound to accept performance of less than all that was promised him is to be distinguished from the question, not to be pursued here, of the duty incurred by one who does accept and in fact has some benefit from a partial performance. It may be the intention of a contract that the promise of one party shall be conditional on the actual performance of the other's promise, so that nothing less than complete performance shall found any claim to payment. If such is really the parties' intention effect will be given to it: the condition, if they choose to make it, is good enough, and an imperfect performance, from whatever cause remaining imperfect, affords no ground of action. The express terms are not fulfilled, and a term or new contract to pay what the benefit received is reasonably worth cannot be introduced where the express terms exclude it.⁸² In its results, though not in its form, such a case resembles that of a reward offered by advertisement to the first person who procures certain information. A person who brings the information, but is not the first to bring it, evidently has no claim on the advertiser, whatever amount of trouble and expense he may have incurred, and although the delay may be due to inevitable accident.⁸³

3. DEFAULT IN FIRST OR OTHER INSTALMENTS OF DISCONTINUOUS PERFORMANCE

Peculiarly troublesome questions have arisen upon contracts for the sale of goods to be delivered and paid for by instalments.

⁸¹ *Wilkinson v. Clements* (1872) L. R. 8 Ch. 96, 110-111.

⁸² Where performance has been defective by the plaintiff's own fault, the burden is on him to show a fresh contract to pay for what he has actually done: see *Sumpter v. Hedges* [1898] 1 Q. B. 673, 671-2; *J. Q. B. 545*; C. A.

⁸³ See *Cutter v. Powell* (1795) 6 T. R. 320, 3 R. R. 185, and notes thereto in 2 Sm. L. C.

It is not yet settled whether failure to deliver the first or any subsequent instalments is or is not presumed, in the absence of any special indication of the parties' intention, to go to the whole of the consideration and entitle the buyer to refuse acceptance of any further deliveries. It seems to be admitted that failure on the buyer's part to pay according to the terms of the contract for the first or any particular instalment as delivered is not of itself a breach of the entire contract,¹ but such default or refusal may by the reason assigned for it, or because of other particular circumstances, manifest an intention to repudiate the contract as a whole, in which case the seller may justly refuse in his turn to go on with the contract.²

In *Hoare v. Rennie*,³ a case decided on pleadings, the contract appeared to have been to sell about 667 tons of iron of a specified kind, to be shipped in June, July, August and September, in about equal portions each month. The action was by the sellers for non acceptance, and for wrongful repudiation of the contract. The buyers pleaded, in effect, that a June shipment of 21 tons only was offered by the plaintiffs, who were never ready and willing to deliver a proper June shipment according to the contract, and that the defendants thereupon refused to receive the portion shipped and tendered, and gave notice that they would not receive the residue. The plaintiffs demurred and the pleas were upheld, as showing that the plaintiffs had not been ready and willing to perform the substance of their contract within the appointed time. In the judgments almost exclusive attention is paid to the question whether the defendants were bound to accept the first shipment; in only one of them is it stated in general terms that the defendants were at liberty to repudiate the contract, but that decision evidently involves this.⁴

In *Simpson v. Crippin*⁵ the contract was to supply about 6,000 to 8,000 tons of coal, to be delivered into the buyer's waggons, in "equal monthly quantities during the period of twelve months from the 1st of July next." During the first month of the contract the buyers, though pressed by the sellers to send waggons, took only 158 tons. The sellers thereupon gave notice to the buyers that they cancelled the contract. It was held that the breach did not justify rescission, and great doubt was thrown upon *Hoare v. Rennie*.

¹ *Marsey Steel and Iron Company v. Naylor* (1884) 9 App. Ca. 434, 439, 444; 53 L. J. Q. B. 497; *Freeth v. Burr* (1874) 1 R. 9 C. P. 208; 43 L. J. C. P. 91.

² *Withers v. Reynolds* (1831) 2 B. & Ad. 882; 30 R. R. 782; *Freeth v. Burr* (1874) L. R. 9 C. P. 208; 43 L. J. C. P. 91; and see per Lord Blackburn, *Marsey Steel and Iron Co. v. Naylor, Benson & Co.* (1884) 9 App. Ca. at 442.

³ (1859) 5 H. & N. 19; 29 L. J. Ex. 73.

⁴ Channell B. 5 H. & N. at 29.

⁵ Much of the language of the judgments would certainly have been more appropriate if the action had been for non-acceptance of the first shipment only. Cf. L. Q. R. n. 281; and per Bowen L. J. in *Marsey Steel and Iron Co. v. Naylor* (1884) 9 Q. B. Div. at 671; and per Jessel M.R. *ib.* at 658.

⁶ (1872) L. R. 8 Q. B. 14.

In *Honck v Muller*²⁰ the contract was to deliver 2,000 tons of iron, "November 1879 or equally over November, December, and January next at 6d per ton extra." The buyer failed to take any of the iron in November, but near the end of the month offered to "take delivery of all in December and January." On December 1 the seller cancelled the contract and was held by the majority of the Court of Appeal to have been entitled to do so, even on the supposition that in the circumstances the buyer could and did elect to take delivery in three portions in the three months named. "I think," said Bramwell I J, "where no part of a contract has been performed and one party so it refuses to perform the entirety to be performed by him, the other party has a right to refuse any part to be performed by him. I think if a man sells 2,000 tons of iron, he ought not to be bound to deliver 1,333¹ only, if it can be avoided."

Meanwhile it had been held in *Fretth v Burr* that refusal by a buyer to pay for a much delayed delivery of the first instalment (under a mistaken claim to set off loss arising from any future default in delivering the residue) did not entitle the seller to rescind the contract. It was suggested that "in cases of this sort where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract, or in other words, evince an intention no longer to be bound by the contract."

The later case of the *Mersey Steel and Iron Company*²¹ where there was only a postponement of payment in peculiar circumstances under erroneous advice confirms *Fretth v Burr* so far as it goes.²² As a positive test the rule of *Fretth v Burr* is doubtless correct, that is a party who by declaration or conduct "evinces an intention no longer to be bound by the contract" entitles the other to rescind, and thus whether he has or has not apart from this committed a breach of the contract going to the whole of the consideration. But it seems doubtful whether the test will hold negatively. Can an intention to repudiate the contract be necessary as well as sufficient to constitute a total and irreparable

²⁰ 18 P 7 Q B Div 42, 5 I J Q B 529.

²¹ See 7 Q B Div 41 at 94, not one third in December, the one third in January, as stated in the head-note.

²² 7 Q B Div 96. Baggallay I J to the same effect, approving *Hoare v Rennie*, and disapproving *Simpson v Crippin*, which Bramwell I J endeavoured to distinguish on the ground that the contract had in that case been partly performed. Brett L J dissented, thinking *Simpson v Crippin* right and *Hoare v Rennie* wrong, (p his dissenting judgment in *Reuter v Sala* 1879, 4 C P Div 239, 48 I J C P 492.)

²³ (1874) L R 9 C P 208, 43 L J C P 91.

²⁴ Lord Coleridge C J at 213, Keating and Denman JJ concurred in affirming this principle.

²⁵ 1884, 9 App Ca 434, 53 I J Q B 497. The House of Lords seems to have thought criticism of *Hoare v Rennie* not relevant.

²⁶ See per Lord Selborne 9 App Ca at 438 and per Lord Blackburn at 442-3.

breach? Can there not be, without any such intent, a failure in a vital part of the performance which destroys the benefit of the contract as a whole? Must it not depend on the nature of the contract and the order and apparent connection of its terms? All that the authorities require of us is not to presume delay in payment, as distinguished from delivery, to be in itself a total breach. In other words, non-payment will not as a rule justify refusal to perform on the other side, unless there be something more in the circumstances by which it is shown to amount to repudiation, as in *Withers v. Reynolds*,⁸⁷ where there was a deliberate and wilful refusal to pay for the successive deliveries according to the terms of the contract.

[In *Maple Flock Co., Ltd. v. Universal Furniture & Co., Ltd.*⁸⁸ rag flock had been sold by A. to B., delivery to be by instalments. Several instalments were delivered and accepted. Then three more were delivered and found to be defective in quality. B. contended that this amounted to a repudiation by A. of the contract, within the Sale of Goods Act, 1893, s. 31 (2) (p. 213), which entitled B. to refuse to accept further deliveries. The Court of Appeal held that it was not such a repudiation, and that B.'s refusal was a breach of the contract. Although the decision was on the interpretation of the Act, the Court freely availed themselves of some of the dicta cited above. They were of opinion that the true criterion of what constitutes repudiation is, in general, not the objective mental state of the defaulting party, but the objective test of the relation in fact of the default to the whole purpose of the contract." They deduced from the authorities that the principles to be applied are, "first, the ratio quantitatively which the breach bears to the contract as a whole, and, secondly, the degree of probability or improbability that such a breach will be repeated.""]

In 1885 the Supreme Court of the United States⁸⁹ had to deal with a case very like *Hoare v. Rennie*. The contract was for 5,000 tons of iron rails to be shipped from Europe "at the rate of about 1,000 tons per month, beginning February, 1880: but the whole contract to be shipped before August 1, 1880." The action was for non-acceptance. A few passages from the judgment of the Court will best show the view taken by them.

"In the contracts of merchants, time is of the essence." The

⁸⁷ (1831) 2 B. & Ad. 882; 36 R. R. 782; Finch, Sel. Ca. (2nd ed.) 712.

⁸⁸ [1934] 1 K. B. 148; 103 L. J. K. B. 513.]

⁸⁹ [At 156.]

¹ [At 157. This principle was applied by analogy to a quite different type of contract, in *Compagnia Primitiva, &c. v. Compania Arrendataria, &c.* [1939] 2 K. B. 117; 108, L. J. K. B. 613.]

² *Norrington v. Wright* (1885) 115 U. S. 189. [See, too, Williston, Contracts, §§ 866—867, and Restatement of Contracts, § 275.]

³ This had already been laid down in England: *Ruter v. Sala* (1879) 4 C. P. Div. 239, see per Cotton L. J. at 249; 48 L. J. C. P. 492. Cp. *Brown v. Guarantee Trust Co.* 128 U. S. 403, 414.

time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons . . .

" The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to payment for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron . . .

" The seller is bound to deliver the quantity stipulated and has no right either to compel the buyer to accept a less quantity or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should have been delivered at once.

" The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfil the contract on his part in respect to these first two instalments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission."

The Court went on to review the English cases, which did not in their opinion establish any rule inconsistent with the decision arrived at in the case at bar. All will agree with them that "a diversity in the law as administered on the two sides of the Atlantic concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated." And although the decision is not authoritative in this country, we may expect that an opinion of such weight, and so carefully and critically expressed, will receive full consideration whenever the point is again before the Court of Appeal or the House of Lords. It is a notable addition of force to the modern tendency to eschew stiff and artificial canons of construction, and to hold parties who have made deliberate promises to the full and plain meaning of their terms.*

The Sale of Goods Act, 1893 (56 and 57 Vict. c. 71), has now declared as follows:—

SECT. 10.—(1) Unless a different intention appears by the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation

* 115 U. S. at 206.

* [Professor Williston, *Contracts* (ed. 1936), § 866, states that the American cases, in general, establish the view that the true test is the materiality of the breach, and he regards later English decisions, especially the *Maple Flock Co.* case (p. 211), as leading our law back in the same direction, after a regrettable deviation in some of the earlier cases to a more artificial test (§ 865).]

as to time is of the essence of the contract or not depends on the terms of the contract.

Sect. 31.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

The apparent intention and effect of these enactments is to put on record the existing state of the authorities without deciding any question that still remains fairly open. What is said as to repudiation is obviously derived from *Freeth v. Burr* (p. 210), but does not seem to amount to a legislative approval of everything that was said in that case: for the Act does not say "shows an intention to repudiate," but "is a repudiation." Indeed, the opinion that the real question is not of intention but of result seems to be rather strengthened than otherwise by this language.*

In the foregoing discussion we have once or twice come very near the problems incidental to the interpretation of conditions and exceptions expressed or implied in contracts: an exception to the duty of performance in case of some future contingent event is, we need hardly say, in the nature of a condition subsequent. The disturbance of business by unforeseen restraints and hindrances in the course of the War, 1914—1918, and the present war has not only magnified the practical importance of such problems but led the Courts to a general review of the doctrine and considerable extension of the governing principles, as we shall see in the following chapter.

4. REPUDIATION[†]

The test laid down for one class of cases by the Sale of Goods Act, 1893, as we have just seen, is an application of the wider principle that a contract may be broken or discharged by repudiation, that is, by conduct manifestly repugnant to the due fulfilment of the terms. The good faith of agreements requires that, so long as anything remains to be done, each party should do what is reasonably necessary for carrying out the intention and should not do anything to hinder completion.[‡] There are three definite ways in which a party to a contract may violate this obligation, namely

* [See *Maple Flock Co., Ltd. v. Universal Furniture, &c., Ltd.*, p. 211.]

† The ambiguity of this term was noticed by the H. L. in *Heyman v. Darwins, Ltd.* [1942] A. C. 356, 371, 378, 398.]

‡ See *Harrison v. Walker* [1919] 2 K. B. 453; 89 L. J. K. B. 105, where a rather adventurous attempt to enforce this duty in unusual circumstances failed.

by an express refusal to perform his part, even if the performance is not yet due; by disabling himself from performance; and by preventing the other party from performing what is due from him.

REFUSAL (ANTICIPATORY BREACH)

It is now well settled that if a promisor under a contract, even before the time for performance has arrived, declares his intention of not performing it, the promisee may treat this as an immediate breach of contract if he thinks fit, and bring his action accordingly.⁶ The reason for the rule may be put in various ways, but the really decisive ground is convenience. The alternative doctrine which appeared tenable till the middle of the nineteenth century was that the promisee's only election is to rescind the contract, thereby renouncing any claim for damages, or to ignore the refusal and await the time for performance, thereby remaining bound to show himself ready and willing to perform at that time though he knows the promisor will not be. The refusal which under the modern rule may be treated as a present breach must, of course, be total, and the promisee's choice whether to treat the contract as rescinded by consent (which might sometimes though seldom be for his advantage) or proceed as for a breach must be clear and final.⁷ Moreover, the promisee must give evidence of his election to treat the contract as rescinded with all reasonable despatch.⁸ Apparently the rule was unwelcome to some of the judges, and its generality was affirmed only when, nearly twenty years after the leading decision, it was held applicable to the contract to marry.

PROMISOR DISABLING HIMSELF

Where the promisor disables himself by his own default from performing his promise, not only is he not excused (for which indeed authority would be superfluous) but his conduct is equivalent to a breach of the contract, although the time for performance may not have arrived, and even though in contingent circumstances it may again become possible to perform it: so says an old authority.⁹

⁶ *Hochster v. De la Tour* 1853, 2 E. & B. 678, 22 L. J. Q. B. 455; 95 R. R. 747; [approved in *Martin v. Stuart* [1925] A. C. 359, 364]. Followed in America, *Roehm v. Horst* (1900) 178 U. S. 1. [In Williston, *Contracts*, §§ 1306-1315, the learned author investigates the history of the rule and strongly criticizes both *Hochster v. De la Tour* and *Roehm v. Horst*. He admits, however, that the law is settled in England in the sense stated in the text above; that it has been adopted in Canada and in the United States, except in Massachusetts and a few other States, and that the Restatement of *Contracts*, § 318, recognizes it, subject to established qualifications.]

⁷ *Johnstone v. Milling* (1886) 16 Q. B. D. 460, 35 L. J. Q. B. 167; [*Guy-Pell v. Foster* [1930] 2 Ch. 169; 99 L. J. Ch. 520.]

¹⁰ *Barnes v. Fleming* [1925] Ch. 264; 94 L. J. Ch. 273.]

¹¹ *Frost v. Knight* (1872) L. R. 7 Ex. 111; 41 L. J. Ex. 79, reversing the judgment below.

¹² 1 Ro. Ab. 448, B, citing 21 E. IV. 54, pl. 26: "If you are bound to enfeof me of the manor of D. before such a feast, and you make a feoffment of that manor to another before the feast, you have forfeited the bond notwithstanding that you have the land back before the feast, having once disabled yourself from making the said feoffment," per Choke J. This really involves the principle of *Hochster v. De la Tour*. [See the criticism of Choke J.'s dictum in Williston, *Contracts*, §§ 1308-1310.]

In a modern case,¹³ Z. promised A., his future wife, in consideration of marriage, to leave her Whiteacre for life. Some time after the marriage Z. conveyed Whiteacre to Q. Held, a breach of contract immediately actionable.

It is obvious that if a man has the choice of performing his promise in more ways than one, and by his own fault is debarred from one of them, he remains bound to the other. Moreover there is no general rule that he is discharged if one alternative is excluded without his fault: in such a case the Court has to decide what the parties intended, and it is an open question of construction.¹⁴ But if the same thing should happen by the promisee's fault, it would seem that the promisor would be discharged.

PREVENTION BY PROMISEE

Where a promisor is prevented from performing his contract or any part of it by the default or refusal of the promisee, the performance is to that extent excused; and moreover default or refusal is a cause of action on which the promisor may recover any loss he has incurred thereby,¹⁵ or he may rescind the contract and recover back any money he has already paid under it.¹⁶ Default may consist either in active interruption or interference on the part of the promisee,¹ or in the mere omission of something without which the promisor cannot perform his part of the contract.²

The principle, in itself well settled, is illustrated by several modern cases. Where the failure of a building contractor to complete the works by the day specified is caused by the failure of the other parties and their architect to supply plans and set out the lands necessary to enable him to commence the works, "the rule of law applies which exonerates one of the two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party,"³ and the other party cannot take advantage of a provision in the contract making it determinable at their option in the event of the contractor failing in the due perform-

¹ *Syng v. Singe* [1844] 1 Q. B. 466; 63 L. J. Q. B. 202, G. A., purporting to follow *Foot v. Knight*; the earlier direct authority seems to have been overlooked.

² See *Barkworth v. Young* (1856) 4 Drew. 1, 24, 26 L. J. Ch. 153; 113 R. R. 297.

³ As in the familiar case of an action for non-acceptance of goods, for not furnishing a cargo, &c.; so with a special contract, e.g., *Roberts v. Bury Commissioners* (1869) L. R. 4 C. P. 755, in Ex. Ch. 5 C. P. 310; 39 L. J. C. P. 129. [See, too, *Southern Foundries* (1906), *Ltd v. Shirlaw* [1940] A. C. 701; 109 L. J. K. B. 461; *Thomas v. Hammersmith B. C.* [1938] 3 All E. R. 203, 208; *Greenhalgh v. Mallard* [1943] 2 All E. R. 234. Another example is where A. extinguishes the possibility of B.'s performance of his contract of employment with A., by transferring the business in which B. is employed to C.; *Collier v. Sunday Referee Publishing Co., Ltd.* [1940] 2 K. B. 657; 109 L. J. K. B. 974.]

¹⁶ *Giles v. Edwards* (1797) 7 T. R. 181; 4 R. R. 414.

¹⁷ 1 Ro. Ab. 453, N. Where a condition can be performed only in the obligee's presence, his absence is an excuse: 1 Ro. Ab. 457, U. A covenant to make within a year such assurance as the covenantee's counsel shall devise is discharged if the covenantee does not tender an assurance within the year, *ib.* 446, pl. 12.

¹⁸ *Roberts v. Bury Commissioners* (1869) L. R. 5 C. P. 310, 329.

ance of any part of his undertaking.¹¹ So where it is a term of the contract that the contractor shall pay penalties for any delay in the fulfilment of it, no penalty becomes due in respect of any delay caused by the refusal or interference of the other party.¹² Where a machine is ordered for doing certain work on the buyer's land, on the terms that it is to be accepted only if it answers a certain test; there, if the buyer fails to provide a fit place and occasion for trying the machine, and so deals with it as to prevent a fair test from being applied according to the contract, he is bound to accept and pay for the machine.¹³

In *Raymond v. Minton*¹⁴ it was pleaded to an action of covenant against a master for not teaching his apprentice that at the time of the alleged breach the apprentice would not be taught, and by his own wilful acts prevented the master from teaching him. This was held a good plea, for "it is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught." An earlier and converse case is *Ellen v. Topp*¹⁵ referred to by the reporters. There a master undertook to teach an apprentice several trades; it was held that on his giving up one of them, and thus disabling himself from complete performance of his own part of the contract, the apprentice was no longer bound to serve him in any. "If the master is not ready to teach in the very trade which he has stipulated [promised] to teach, the apprentice is not bound to serve."

[In all these cases, the prevention by the promisee constituted a breach of contract. But where the promisee does or omits to do something which, as between the promisor and himself, he is free to do or not to do, he commits no breach of contract, and therefore cannot be held liable for prevention. Thus, a house-agent who is promised a commission on the express condition that he brings about a sale has no cause of action against his principal if the latter disposes of the property himself or through other channels, for that eventuality is a business risk which a house-agent must take.¹⁶]

¹¹ See page 215 for note.

¹² *Holne v. Guppy* (1838) 3 M. & W. 387, 40 R. R. 647, *Russell v. Du Bandeira* (1862) 13 C. B. N. S. 149, 32 L. J. C. P. 68.

¹³ *Mackay v. Dick* (1881, in H. L. Sc.) 6 App. Cas. 251.

¹⁴ (1866) L. R. 1 Ex. 244, 35 L. J. Ex. 153. So if a pawnbroker's apprentice is a habitual thief: *Leardon v. Brook* [1891] 1 Q. B. 431; 60 L. J. Q. B. 373.

¹⁵ (1851) 6 Ex. 424, 432, 20 L. J. Ex. 241, 80 R. R. 353. For this too there is good authority much earlier: see per Choke J. 22 Id. IV, 26.

¹⁶ *Luxor (Eastbourne), Ltd. v. Cooper* [1941] A. C. 108, 110, 141, 148, 149; 110 L. J. K. B. 131; *Dalrymple v. George Trollope & Sons* [1943] 1 All E. R. 701; *Jones v. Lowe* [1945] K. B. 73.]

7

CONDITIONS,¹ AND HEREIN OF FRUSTRATION

CONDITIONAL PROMISES

A promise is called unconditional when the promisor binds himself to performance in any event; conditional when performance is to be due only if some state of facts not within the promisor's knowledge now exists, or is to be demandable or not according to some uncertain event in the future. A condition may be annexed to the promise either by its express terms, or by a tacit common understanding of the parties.

A familiar example of conditional promise is the insurer's undertaking in a contract of marine, fire or accident insurance. Every guaranty of whatever kind is likewise a conditional promise. Reciprocal promises may both be conditional, as in the common case of a wager, which is an agreement complete in form though for reasons of substance not enforceable.

Some very learned writers include in the class of conditional promises those which are to be performed only after the lapse of a certain time. But this does not appear to be correct; for, in the world of space and time in which we live, the lapse of time is not contingent but certain. Thus the insurer's promise in a contract of life insurance is not conditional, since human life must come to an end sooner or later; this is not the less so because there may be conditional incidents, such as the addition of bonuses to the original sum insured in a mutual society. On the other side no one would call the promise of a lessee for lives, or a term determinable on lives, conditional, though the number of times rent will be due depends on the uncertain length of the lives named. The fact that the extent of a promisor's obligation can be determined only by future events does not make the obligation itself conditional. We may add that, if lapse of time were of itself a condition, the acceptor of a bill of exchange at six or three months would be a promisor on condition; but to call him so would contradict the settled elementary definition of a negotiable instrument as an unconditional order in writing.

On the other hand the conception of conditional acts in the law was formerly limited in the usage of learned authors to those which depend on a future contingent event assigned by the will of the

¹ As to the various and formerly not always well defined senses in which the words "condition" and "warranty" have been used in our books, see a profitable note in the Appendix to Chalmers on the Sale of Goods.

parties.² This restriction is incompatible with the language and doctrine of our modern authorities, and is not acceptable on its merits. "Any present fact which is unknown to the parties is just as uncertain for the purposes of making an arrangement at this moment as any future fact."³

The difference between a condition and an ordinary term of an agreement must be carefully borne in mind. Non-performance of a term gives a right of action for the breach; failure of a condition acts as a release of the corresponding duty.⁴

CONDITIONS PRECEDENT AND SUBSEQUENT

In the case of a conditional promise properly so called, namely where the promisor's obligation becomes effective only if some state of facts exists or if and when some further event happens, his agreement is said to be subject to a condition precedent. There is another very important class of promises in which the promisor's duty is perfect in its inception, but later events, according to express or unexpressed terms of the agreement, may dispense him from performance wholly or in part. In such cases the agreement is said to be subject to a condition subsequent.

Events interfering with the performance of a promise may or may not operate as conditions subsequent according to the intention of the parties and the nature of the case. The simplest case occurs where the parties have both contemplated and specified, such events; less simple, but still in the region of ascertainable fact, is that where they contemplated them and had a common understanding but did not express it in words (a known trade custom, for example, being assumed to be applicable); more serious difficulties arise where the parties had no such event in their mind at all, and the Court has to decide what they would, as reasonable men, have agreed upon or understood if they had contemplated that which in fact has happened. Questions under the last head, as interesting as they are hard, have become prominent in our time.

Perhaps the best example in form of a condition subsequent is to be found in a bond, an instrument under seal applied to many kinds of contracts in the Middle Ages,⁵ but now in use only for securing payment of official dues and the like. The obligor, as the promisor is called, declares himself bound to pay a sum of money; but by the terms of the condition following, his obligation is to be void if he pays a less sum (usually half of the first-named

² "Une condition est le cas d'un événement futur et incertain, qui peut arriver ou ne pas arriver, duquel on fait dépendre l'obligation": Pothier, *Obl.* § 199. Similarly, Savigny, *Syst.* 3. 121.

³ Holmes, *The Common Law*, 304; cp. 329.

⁴ See per Bramwell B. *Jackson v. Union M. I. Co.* (1874), L. R. 10 C. P. at 143.

⁵ Accordingly the clues to the medieval doctrine and practice of contracts are mostly to be found under the title of Condition in the old Abridgments.

or penal sum) at a certain date, or, as the case may be, performs a specified act or a continuing series of duties. A bond might well enough, in point of form, be conditioned on the happening of something independent of the obligor's action; but this does not occur in practice. Here the only real object is the performance or satisfaction of the condition. The equitable interpretation of the penalty will be mentioned in another place.

PARTIAL CONDITIONS

Particular terms of an agreement may be conditional, or there may be alternative promises according to different possible events. Terms of this kind are often expressed by way of exception from the general effect of the principal undertaking, this does not affect their substantial character. A party's promise is conditional as a whole only when it does not oblige him to any immediate duty whatever unless or until some condition is satisfied.

EXPRESS AND IMPLIED

Conditions are either express or implied. The effect of express conditions has to be determined by the ordinary rules of construction or by special rules belonging to the learning of particular classes of contracts. The existence and effect of implied conditions depend on the nature of the contract and the Court's estimate of what provision the parties would have made as reasonable men* if they had contemplated events that in fact were beyond their foresight. Rules arrived at in this way go far beyond the regular process of judicial construction, and are prevented from being positive rules of law only by the reservation that they are always in aid of the presumed intention of the parties, and there is no place for them where the actual intention can be ascertained. Some judicial statements have even said that the Court must find an actual though unexpressed intention that the agreement should not be applicable to the new state of facts on which the question arises. But any such view is surely too narrow for doing justice in unforeseen emergencies, and would lead in practice to something very like a new class of legal fictions. The sound doctrine, it is submitted, is that which Lord Russell of Killowen, being then a judge of first instance, expressed as follows in the *Badische Co's case*. The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain

* *Dahl v. Nelson* (1881) 6 App. Cas. 38, 59, per Lord Watson.

- [1921] 2 Ch. 331, 379.

expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract. These general statements are, I conceive, justified by the language used, and the views expressed by Lord Sumner in *Bank Lane v. Capel & Co.*⁹ and by the Lords before whom was argued the *Tamplin case*.¹⁰

Also Lord Watson said more than half a century ago, though with reference at the time only to a special class of contracts, "there may be many possibilities within the contemplation of the contract . . . which were not actually present to the minds of the parties at the time of making it, and, when one or other of those possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."¹¹

Lord Bowen's statement as to the nature of implied warranties or covenants, made by him as a member of the Court of Appeal before the recent extensions of the doctrine, will be found no less applicable to conditions. The implication, he says, is founded on the presumed intention of the parties, and the object aimed at is "to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."¹²

EXPRESS CONDITIONS

No special words are necessary to create an express condition. In contracts of sale a term expressed to be a warranty may still operate as a condition;¹³ in such cases there are the distinct alternative courses of maintaining the contract and relying on the warranty or insisting on the condition and disowning the contract. More generally, it may be a question whether a descriptive statement is a mere representation or a substantive part of the contract,

⁹ [1919] A. C. 435.

¹⁰ [1916] 2 A. C. 797.

¹¹ *Dahl v. Nelson* (1881) 6 App. Ca. at 59; similarly *Bailhache J. Comptoir Commercial Anderson v. Power* [1920] 1 K. B. 868, 879; 89 L. J. K. B. 849.

¹² *The Moorcock* (1889) 14 P. Div. 64, 68; 48 L. J. P. 73.

¹³ P. 424.

and, if it be a substantive part, whether it amounts to a condition; such points are for the Court to decide as matter of construction with the aid of the circumstances found as a matter of fact.

Thus in a charter-party where it was agreed that the plaintiff's ship, "now in the port of Amsterdam," should go to an English port and load a cargo of coals to be provided by the defendant, it was held that the situation of the ship was not mere matter of description, but an essential term or condition of the agreement. The Court considers not only the language of the instrument, but the circumstances under which, and the purposes for which it was made. So far the leading case of *Behn v. Burness*.¹³

Further, a statement about the subject-matter of an agreement made in the course of the preliminary negotiation by the party with whose knowledge it is or ought to be may amount to a condition if such appears to be the intention of the parties, though the agreement itself does not embody it as part of the description; and this effect will not be excluded, as matter of law, by the inclusion in the agreement as concluded of a warranty of more or less similar content. In this class the most striking example is *Bannerman v. White*.¹⁴ The case arose on the sale of a year's growth of hops by the grower to hop merchants. It was known that many brewers would not buy hops that had been treated with sulphur. When samples were produced the buyers' representative asked if any sulphur had been used that year, which was denied; and according to the findings of the jury as accepted by the Court he added that he would not even ask the price if any sulphur had been used. The price being agreed on, the seller gave an express guarantee "against any loss . . . through the mode of treatment on the poles or curing." It turned out that sulphur had been experimentally applied to a small part of the crop (5 acres out of 300). The seller had honestly forgotten this, in the view of the jury, who expressly negatived wilful misrepresentation. The buyers received the hops, but on discovering that some part was sulphured, and the whole mixed together, refused to accept them. The Court held that there was only one question of substance, namely, what the parties intended; "the intention of the parties governs in the making and the construction of all contracts"; and on the facts as found the intention appeared to be "that the contract should be null if sulphur had been used," and accordingly the buyer was entitled to repudiate the agreement. In the particular case the result may be thought hard on the seller, for his express warranty was to all appearance meant to provide for just such an accident as happened. But this only makes the example more instructive.

¹³ (1863) Ex. Ch. 3 B. & S. 751; 124 R. R. 794; 32 L. J. Q. B. 204, reversing the judgment in Q. B.

¹⁴ (1861) 10 C. B. N. S. 844; 128 R. R. 953, decided by a very strong Court.

PROMISSE'S PRIMARY RIGHT

We have to remember here that a promisee's first and paramount claim is to fulfilment of the contract according to its terms as reasonably understood; this is best exemplified in a buyer's right to have merchantable goods answering the description in the contract, but the principle is not confined to the contract of sale. In the case of sale it makes no difference that a defect rendering the goods unmerchantable exists in a sample by which they were sold, if that defect is not discoverable by "the usual and appropriate inspection," neither is the general duty cut down by an express warranty of less extent" or by a refusal to give any warranty at all.¹¹ It may be however that the description of the thing or performance contracted for is not all in one piece (as where there is a previous declaration¹²) or so far as the words of description go is severable,¹³ and in these cases the satisfaction of it in all points is almost necessarily spoken of as a condition.

From this point of view we may consider it not very material whether an essential requirement is laid down as a preliminary condition or embodied in the agreement as a term thereof: but the consideration of such requirements in the light of paramount general intention makes the transition from express to implied conditions easier.

IMPLIED CONDITIONS

Formerly our Courts were averse to going beyond the strict letter of instruments and would only in extreme cases imply terms that were not expressed or at least imported by some generally understood custom. Thus it was decided in 1647 that a leasehold tenant's obligation to pay rent is not affected by the destruction of a building demised, or other inevitable accident interrupting his occupation, not even in the extreme case of eviction by public enemies. It was said that supervening disability without the party's fault will excuse him if the duty or charge is created by law and there is no remedy over: but when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."¹⁴

¹¹ *Diamond v. Inghen* 1887 12 App. Cas. 284, 36 I. J. Q. B. 363, cp. *Heilbutt v. Huxton* (1872) L. R. 7 C. P. 498, 41 I. J. C. P. 228 which seemed a peculiar case at the time, but now falls quite naturally into its place under the principles consolidated in s. 15 of the Sale of Goods Act, 1893.

¹² *Bannerman v. White*, p. 221.

¹³ *Wallis v. Pratt* [1911] A. C. 304, 80 I. J. K. B. 1058, adopting *Fletcher Moulton* L. J.'s dissenting judgment below [1910] 2 K. B. 1003, 1011.

¹⁴ *Bannerman v. White*, p. 221.

¹⁵ *Behn v. Burness*, p. 221.

¹⁶ *Paradine v. Jane*, Aleyn, 26. Reservation of rent creates the same duty that an express covenant by the lessor (absent in this case) would, 16. Neither the date of the decision nor the reporter's standing (see *Wallace on the Reporters*) can be

This rule appears to be peculiar to the common law. In the Roman law²¹ and in the law of Scotland,²² and presumably in all systems where Roman doctrine prevails, it is otherwise; and it may be doubtful what an English Court would hold at this day if the question were open.²³ But it is concluded here by authority, and modern decisions add (which is only a logical consequence) that it does not matter whether the lessor is insured or not,²⁴ this being merely collateral to the contract between landlord and tenant.

The medieval canons of strict construction were perhaps not irrational in their time; there was much to be said for them so long as the superior courts were mostly concerned with solemn and formal instruments. But they became inconvenient when the King's judges took over the common affairs of mankind from the decaying local and customary jurisdictions; and a series of exceptions was introduced which have grown at an increasing rate since the middle of the nineteenth century, and now, since the notable examples added by cases arising out of the war of 1914, can be regarded as branches of a comprehensive principle. That principle may be broadly stated, without any pretence to exact verbal accuracy, to the following effect. Where the fulfilment of a contract according to the parties' true meaning and intent demands not only their action in conformity with the terms, but the occurrence of events in the normal order contemplated, or the existence or continuance of a normal state of things at the due time of performance, and the material circumstances are so radically changed by unforeseen accident that the purpose of the contract as a whole is frustrated, there a performance which has become impossible, or though literally possible would be futile, is excused, and both parties are discharged.²⁵ This, however, is not a rule of positive law, but a canon of interpretation; it is in aid of the parties' presumed reasonable intention and must yield so any sufficient indication of what in fact they intended. There is

said to recommend it, but it is typical of the views then current and has been uniformly followed. It has been applied in our own time in a case of military occupation under statutory authority: which was held not to amount to eviction by title paramount: *Mathey v. Curling* [1922] 2 A. C. 180; 91 L. J. K. B. 593; a curious case involving various disputable matters which cannot be pursued here. [See, too, the *Cricklewood Case*, *post*, 246.]

²¹ D. 19. 2. locati conducti, 15. Extraordinary accident in general ("omnem vim cui resisti non potest") is at the lessor's risk; the case of hostile eviction—"si incursus hostium fiat"—is expressly included.

²² Bell, *Principles*, § 1208.

²³ [For American law, see Williston, *Contracts*, §§ 943—946. The common law in the United States with respect to destruction of leased property, or its seizure by eminent domain, is generally the same as the rule in *Paradine v. Jane*, but an illogical distinction is taken between total and partial destruction of the premises, relief being given to the tenant where it is total.]

²⁴ *Leeds v. Cheetham* (1827) 1 Sim. 146; 27 R. R. 181; *Loft v. Dennis* (1859) 1 E. & E. 474; 28 L. J. Q. B. 168; 117 R. R. 292. On the effect of special agreements, *Reynard v. Arnold* (1875) L. R. 10 Ch. 386; *Edwards v. West* (1878) 7 Ch. D. 858.

²⁵ The discharge [does not necessarily annul an arbitration clause: *Heyman v. Darwins, Ltd.* [1942] A. C. 356, H. L., criticizing on this point *Hirji Mulji v. Chong Yaw S.S. Co.* [1926] A. C. 497; 95 L. J. P. C. 121; see p. 304].

nothing new in the test of the unforeseen event being "of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made." That was laid down long ago by Hannen J., afterwards Lord Hannen, delivering the judgment of the Court of Queen's Bench.²⁶ But it was then supposed that the test was applicable only in case of the performance having become actually impossible. Recent authority shows that the application is wider, and gives us an enlarged view by which the real difference between the archaic rules of construction and the modern endeavour to give effect to the genuine intention is marked.²⁷ [Viscount Simon, L.C., has defined frustration as "the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement."]²⁸

The Indian Contract Act attempted to generalize the doctrine as long ago as 1872. S. 56 para. 2 reads:

A contract to do an act which after the contract is made becomes impossible or, by reason of some event which the promisor could not prevent, unlawful becomes void when the act becomes impossible or unlawful.

This is unsatisfactory both in excess and in defect. It purports to lay down a positive rule of law regardless of the parties' intention, and therefore is too wide; yet it fails in terms to include the case of literal performance being possible but useless, and in that respect is too narrow. It does not appear, however, that there has in practice been any material divergence from English doctrine.

The case of a condition, express or implied, in a continuing contract, which gives either party an option to determine the contract in certain events, is of course quite different.

DISCHARGE BY FRUSTRATION²⁹

We shall now proceed to show the application of the principle of discharge by frustration in its several branches, after stating

²⁶ *Baily v. De Crespigny* (1869) 1 L. R. 4 Q. B. 180, 185, 38 L. J. Q. B. 98. See more on this case at p. 243.

²⁷ The peculiar case of the conditions implied in gifts made in contemplation of marriage is dealt with by *McCardie J.* in *Cohen v. Sellar* [1926] 1 K. B. 536, 95 L. J. K. B. 629.

²⁸ [*Cricklewood Property Ltd. v. Leighton's Investment Trust, Ltd.* [1945] A. C. 221. It is respectfully submitted that in certain circumstances frustration may operate even where the event constituting it was contemplated by the parties, *post*, p. 228.]

²⁹ Grave judicial doubt has been expressed whether this is really an apt term: *per Scrutton L.J.* in *May v. May* [1929] 2 K. B. 386, at 393, 98 L. J. K. B. 770. But no substitute has been suggested, and many other terms familiar in the law were not more apt when they were new. [The term now has the implied sanction of both the House of Lords in its judicial capacity and the legislature; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour* [1943] A. C. 32; Law Reform (Frustrated Contracts) Act, 1943, s. 1, sub-s. 1, *post*, 248.]

first, for the sake of clearness, the normal rule of positive obligations.

[The more important of the recent decisions on frustration, so far as they affect the author's exposition of the topic, are noted in their proper context in the following pages. But it is advisable to give here a succinct account of the trend of current judicial and juristic thought regarding the various theories which have been put forward as to the basis on which the doctrine of frustration rests. The literature is voluminous and much of it is concerned with the effect of war on contracts.²² The following are the more conspicuous of the various principles that have been suggested. It will be seen that some of them are propounded as covering practically the whole ground, while others are admittedly appropriate to certain types of frustration, but not to all

(1) THE THEORY OF THE 'IMPLIED TERM'

Where subsequent to the making of the contract, an event occurs without the fault of either party, which makes further performance (or, if nothing has been done, any performance) of the contract incapable of achievement by either or both of the parties, a term must be implied that no reasonable person would regard the party, who is affected by the occurrence of the event, as willing to continue to be bound by the contract if, when the contract was made, he could have foreseen exactly what would have been the effect of that event. The balance of judicial authority seems to be in favour of this view.²³

²² [The following is a selection of it which does not profess to be in any way exhaustive. *Books*: McLeroy, *Impossibility of Performance in Contract* (1941), (Gottschalk, *Impossibility of Performance in Contract* (1938), Sir Arnold McNair, *Legal Effects of War* (2nd ed 1944) ch 6, Trotter, *Law of Contract during and after War* (4th ed 1940), Webber, *Effect of War on Contracts* (1940), Rogers, *Effect of War on Contracts* (1940), Rogers, *Effect of War on Contracts* (1940). *Articles*: Lord Wright in *Legal Essays* (1939) 247-248, 254-259, Sir Arnold McNair, in 56 *L. Q. R.* (1940), 171-207, Prof Gutteridge, in 51 *L. Q. R.* (1935) 108-112, McLeroy & Williams, in 4 *Modern Law Review* (1941), 241-260, 5 *Modern Law Review* (1942), 1-21 ("The Coronation Cases"), Williams, in 57 *L. Q. R.* (1941) 373-399, 490-511 (*Partial Performance of Entire Contracts*), H. W. R. Wade in 56 *L. Q. R.* (1940) 519-556, and 7 *Cambridge Law Journal* (1941), 361-378. For American law see Williston *Contracts* §§ 1931-1979, and *Restatement of Contracts*, §§ 454-460 and Index, "Impossibility."]

²³ [Viscount Simon in *C* in *Joseph Constantine S.S. Ltd v Imperial Smelting Corporation Ltd* [1942] *A.C.* 154, 163, (in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour, Ltd* [1941] *A.C.* 32, 47, Viscount Simon suggested as an alternative to the 'implied term' theory "an obligation to repay arising from circumstances"), the *C* in *Broome v Pardess Co-operative Society, &c* [1940] 1 *All E.R.* 603, Branson J in *Court Line, Ltd v Dani* [1939] 3 *All E.R.* 314, 161 *L.T.* 35, *contra*, Lord Wright in *Denny, Mott & Dickson, Ltd v James B. Fraser & Co., Ltd* [1944] *A.C.* 265, 275-276, of Lord Porter, *ibid*, 281. For earlier *dicta* supporting this theory, see Sir Arnold McNair in 56 *L. Q. R.* (1940) 174-176. A friendly critic of the eleventh edition of this book inferred that I favoured the theory of the 'implied term' (87 *Sol. Journal*, 146), but my conclusions on pp 227-228, *post*, show that I do not commit myself to any of the five theories considered here. Indeed, I agree with the learned reviewer that this particular theory displays an "inherent artificiality"]

(2) THE THEORY THAT THE FOUNDATION OF THE CONTRACT HAS BEEN ANNIHILATED BY THE FRUSTRATING EVENT: *NON HABET IN FOEDERA VENI*.²¹

It has been suggested that the distinction between this theory and that of the implied term is merely academic²² and, alternatively, that the "foundation" theory is the same as the "implied term" theory.²³ These first two theories are the most prominent in judicial decisions, but others have been formulated and they are added here

(3) THE THEORY OF FAILURE OF CONSIDERATION

The contention of those who urge this theory is not that it covers all cases of frustration, but that many decisions are properly referable to this heading.²⁴ Its weakness is the difficulty of establishing any clear line between frustration and failure of consideration which is due to no fault of either party.

(4) THE THEORY OF COMMON MISTAKE

i.e., both parties act upon a fundamental assumption which proves to be false. This has been advocated by Professor Williston in America,²⁵ and, in England, Lord Haldane inclined to it,²⁶ but, as Lord Wright has pointed out, it will scarcely fit impossibility supervening after the contract has been made.²⁷

(5) THE THEORY OF QUASI-CONTRACT

A learned author has put this forward,²⁸ but it is difficult to discover any English decision that bases the occurrence of the frustrating event on quasi-contract. It is true that the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*²⁹ held that, where a contract had been frustrated, the right to recover a payment, which had been made in pursuance of the contract prior to its frustration, was based upon quasi-contract; and this is impliedly recognized in the Law Reform (Frustrated Contracts) Act, 1943³⁰; but both the decision

²¹ [Lord Finlay L.C. in *Bank Line, Ltd. v. Capel & Co.* [1919] A. C. 435, 442; Lord Haldane, in *Tamplin S.S. Co. v. Anglo-Mexican Petroleum Co.* [1916] 2 A. C. 397, 406; Goddard J. in *Tatem, Ltd. v. Gamboa* [1939] 1 K. B. 132. For other cases, see 50 L. Q. R. (1940) 176-179.]

²² [*Coari Line, Ltd. v. Dani* [1939] 3 All E. R. 313, 161 L. L. 35.]

²³ [50 L. Q. R. (1940) 178. In *Tatem, Ltd. v. Gamboa* [1939] 1 K. B. 132, Goddard J. might appear to have deduced a practical difference from adopting the "foundation" theory, but, properly understood, it is submitted that the decision does not warrant the inference: p. 228.]

²⁴ [McElroy, *Impossibility of Performance*, ch. IV, V. The learned author makes a courageous but, we venture to think, unsuccessful effort to restrict frustration to events causing inordinate delay in the performance of the contract. Cf. 58 L. Q. R. (1942) 280-281.]

²⁵ [Contracts, § 1937.]

²⁶ [*Bank Line, Ltd. v. Capel & Co.* [1919] A. C. 435, 445.]

²⁷ [*Joseph Constantine S.S., Ltd. v. Imperial Smelting Corporation* [1942] A. C. 154, 186.]

²⁸ [Webber, *Effect of War on Contracts*, Preface and Ch. XIV.]

²⁹ [1943] A. C. 32.]

³⁰ [6 and 7 Geo. 6, c. 40, s. 1 (2); post, 248.]

and the Act relate to the consequences of frustration and not to the principle that determines whether frustration has occurred. Moreover, the essence of quasi-contractual liability is unjust benefit (or, as some prefer to call it, unjust enrichment), and often neither party has done or received any thing under a contract affected by frustration.

We have no intention of adding any new theory on our own account, but we would suggest a rather different line of approach to the principle underlying the doctrine of frustration. In the first place it is essential to understand what frustration means according to the judicial decisions on the subject. No doubt variations of signification are to be found in them, but upon the whole they appear to contemplate the following situation. After the formation of a contract, certain sets of circumstances arise which, owing to the fault of neither party, render fulfilment of the contract by one or both of the parties impossible in any sense or mode contemplated by them. These sets of circumstances have been more or less defined by the Courts and are held by them to release both parties from any further obligation to fulfil the contract. Apart from supervening illegality (as to which, see below), the question which the judge has to solve is this. Would any reasonable third party consider the effect of such circumstances as altering the obligation of one or both of the parties to such an extent as to make the contract no longer capable of being enforced? The "reasonable third party" is the Court itself. Whatever additional theory the Courts have adopted, this is the basic principle on which they must ultimately decide the problem. In that light all the theories mentioned above are best regarded as more or less complete alternative ways of stating or perhaps masking this basic principle. That principle involves the consideration of what is reasonable. Now there is of necessity an elasticity in determining what a reasonable third party would decide to be the solution of a problem of this kind. Naturally, different results are occasionally reached by the judges on facts that appear somewhat similar. Exactly the same thing happens in judicial application of "reasonable" in the law of negligence as a tort. But it is useless to attempt to make "reasonable" a precisely exact term. Indeed it would be mischievous to do so, for a good deal of injustice would result from trying to mechanize the law where a certain amount of pliability in its application is essential.²²⁰ Where the event that puts an end to a contract is supervening illegality (e.g., the outbreak of war may have that effect; *post*, 292), the foregoing considerations do not apply. The only question for the Court is whether the supervening illegality has occurred. Any

²²⁰ [See Lord Wright in *Denny, Mott & Dickson, Ltd v. James B. Fraser & Co., Ltd* [1944] A.C., at pp. 273-274].

investigation of what a reasonable third party would think about it would be beside the mark."²⁴

It is convenient to consider here whether frustration can apply where the supervening events were foreseen by the parties. If the inability to perform the contract is due to the fault of one of the parties, he cannot successfully plead frustration. It is also true that if the parties expressly contract with reference to the occurrence of the supervening events, frustration is inapplicable. But there is another type of case outside these rules. The parties when they made the contract, may have foreseen the supervening events as probable, but may have made no express provision with respect to them. Here, if the events occur, frustration can be pleaded.²⁵ Further, although a clause in the contract may expressly refer to the event, yet, properly interpreted, it may throw no light on whether the contract is *terminated altogether* by its occurrence: e.g., the accepted risk of "restraint of princes" in a charter-party.²⁶

UNQUALIFIED PROMISES IN GENERAL

Generally speaking, a man who makes an unqualified promise thereby not only declares his willingness but vouches for his ability to perform it. Especially this is so where the promise is to pay money or to furnish a known marketable article of commerce. A man may owe a sum certain and have neither ready money nor credit; but, as a great master has said, "There is plenty of money in the world, and it is a matter wholly personal to the debtor if he cannot get the money he has bound himself to pay."²⁷ Neither is a man excused if he chooses to make himself answerable for the acts or conduct of third persons, though beyond his control; or even, it seems, for a contingent event in itself possible and ordinary but beyond the control of man. It has been said that a covenant that it shall rain to-morrow might be good,²⁸ and that "if a man is bound to another in *sol.* on condition *quod pluvia debet pluere cras*, . . . in that case *si pluvia non pluit cras* the obligor shall forfeit the bond, though there was no default on his part, for he knew not that *pluvia non debet pluere*. . . . In like manner if a man is bound to me on condition that the Pope shall be here at Westminster to-morrow, then if the Pope comes not though there is no default on the

²⁴ [Schering, Ltd. v. Stockholm Enskilda Aktiebolag [1944] Ch. 13 (C. A.);

²⁵ Viscount Simon, L. C. in the *Fibrosa Case* [1943] A. C. 32, 41.]

²⁶ [Tatem, Ltd. v. Gamboa [1939] 1 K. B. 132.]

²⁷ [See Lord Sumner in *Bank Line, Ltd. v. Capel & Co.* [1919] A. C. 435, 456; Bankes L. J. in *Scottish Navigation Co., Ltd. v. Souter & Co.* [1917] 1 K. B. 222, 247.]

²⁸ Savigny, *Obl.* 1. 384; cp. D. 45. 1 de v.o. 137 § 4 (Venuleus): "haec recedunt ab impedimento naturali et respiciunt ad facultatem dandi."

²⁹ By Maule J. *Canham v. Barry* (1855) 15 C. B. at 619; 24 L. J. C. P. at 106; 101 R.R. at 513. Per Cur. *Baily v. De Crespigny* (1869) L. R. 4 Q. B. at 185. The probability of any such agreement being in fact a wager (as in the sport of "rain-gambling," well known in India) is irrelevant to the general principle.

defendant's part, yet he has forfeited the obligation."⁴⁶ "Generally if a condition is to be performed by a stranger and he refuses, the bond is forfeit, for the obligor took upon himself that the stranger should do it."⁴⁷ "If the condition be that the obligor shall ride with I. S. to Dover such a day, and I. S. does not go thither that day; in this case it seems the condition is broken and that he must procure I. S. to go thither and ride with him at his peril."⁴⁸ Where the condition of a bond was to give such a release as by the Court should be thought meet, it was held to be the obligor's duty to procure the judge to devise and direct it.⁴⁹ If a lessee agrees absolutely to assign his lease, the lease containing a covenant not to assign without licence, the contract is binding and he must procure the lessor's consent.⁵⁰

Again, there is no reason why a man should not make himself answerable, if he chooses to do so with his eyes open, for accomplishing something very difficult or not known to be practicable. Conceivably a promise might be so extravagant or absurd "that the parties could not be supposed to have so contracted,"⁵¹ but I know of only one case in our books that comes anywhere near this description:⁵² nor is it necessary to consider in this country what would be the correct way of dealing with an agreement that appeared on the face of it absurd to the Court but not to the parties.⁵³ In a case of that kind it is not unlikely that the promisee might believe in the possibility of the performance nominally promised, while the promisor did not; this would reduce the matter to a question of fraud, with its usual consequences. As to what may be possible or not in any exact sense, the less said about it the better when we go beyond the impossibility of a proposition and its contradictory being both true under identical conditions. In the early editions of this book it was suggested with some diffidence that an agreement to make a practicable flying machine need not be regarded as absolutely

⁴⁶ Per Brian C. J. Mich. 22 Id. IV. 26. The whole discussion there is curious, and well worth perusal in the book at large. Note Brian's change of opinion as to the plea in the case at bar, *ad fin.*

⁴⁷ Ro. Ab. i. 452, L. pl. 6

⁴⁸ Shepp. Touchst. 392

⁴⁹ *Lamb's case* (1599) 5 Co. Rep. 23 b

⁵⁰ *Lloyd v. Crisp* (1813) 5 Taunt. 249, 14 R. R. 744; cp. *Canham v. Barry* (1855) 15 C. B. 597; 24 L. J. C. P. 100; 100 R. R. 503. Otherwise as to sale of shares in a company for which the directors' assent is required, on the Stock Exchange at all events: *Stray v. Russell* (1859) Q. B. & Ex. Ch. 1 E. & E. 188, 196, 28 L. J. Q. B. 279, 29 L. J. Q. B. 115.

⁵¹ Brett J. in *Clifford v. Watts* (1870) L. R. 5 C. P. at 588.

⁵² In *Thornborow v. Whistacre* (1706) 2 Ld. Raym. 1164, a promise to deliver two grains of rye on a certain Monday, and four, eight, sixteen, &c. on alternate Mondays following for a year, was said by Holt to be "only impossible with respect to the defendant's ability," though it was urged for the defendant that "all the rye in the world was not so much." No judgment was given, the case being settled. The point that the parties could not have been in earnest was not made.

⁵³ "A. agrees with B. to discover treasure by magic. The agreement is void": I. C. A. x. 56, ill. (a). An agreement in that form would hardly occur; if A. did discover the treasure, with or without performance of magic rites, it would probably be held that the specification of means was not material.

impossible. At this day many supposed immutable verities of physics and even mathematics have come to be allowed only a relative validity sufficient for usual purposes. Definition of "*quod natura fieri non concedit*" is no such easy matter as it appeared to the Roman jurists⁴¹ or to our own ancestors.

Putting the hypothetical case of obvious absurdity aside, a thing is not to be deemed impossible merely because it has never yet been done, or is not known to be possible. "Cases may be conceived," said Willes J.,⁴² "in which a man may undertake to do that which turns out to be impossible, and yet he may still be bound by his agreement. I am not prepared to say that there may not be cases in which a man may have contracted to do something which in the present state of scientific knowledge may be utterly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the non-performance, and cannot set up by way of defence that the thing was impossible. But before we arrive at such a conclusion, we must be satisfied, if no other reasonable construction suggests itself, that the party really did intend to warrant that to be possible which was impossible."

If a man may bind himself to do something which is only not known to be impossible, much more can he bind himself to do something which is known to be possible, however expensive and troublesome, and it will make no difference, provided that his promise was really unqualified, if performance turns out not to be practicable in the manner contracted for, or at all. Nor does it matter whether the impediment exists at the date of the contract, or arises from events which happen afterwards.⁴³ Thus an absolute contract to load a full cargo of guano at a certain island was not discharged by there not being enough guano there to make a cargo:⁴⁴ and where a charter-party required a ship to be loaded with usual despatch, it was held to be no answer to an action for delay in loading that a frost had stopped the navigation of the canal by which the cargo would have been brought to the ship in the ordinary course.⁴⁵ Still less will unexpected difficulty or inconvenience short of impossibility serve as an excuse. Where insured premises were damaged by fire and the insurance

⁴¹ D. 45. 1. dev.o. 35 pr.

⁴² *Clifford v. Watts* (1870) L. R. 5 C. P. 577, 585.

⁴³ *Atkinson v. Ritchie* (1809) 10 East, 530; 10 R. R. 372; [*Broom v. Pardess, &c., Ltd.* (1940) 1 All E. R. 603].

⁴⁴ *Hills v. Sughrus* (1846) 15 M. & W. 253; 71 R. R. 651. This case turned in part on the unusual incident of the charter-party providing that the cargo was to be found by the owner. "He is to receive freight at a high rate, and it looks very much like a contract for supplying guano at that price": Park B. 15 M. & W. at 261. Whether it can be reconciled with later authorities or not, it is too peculiar to be a safe guide.

⁴⁵ *Kearon v. Pearson* (1861) 7 H. & N. 986; 31 L. J. Ex. 1; 126 R. R. 473. So where a given number of days is allowed to the charterer for unloading, he is held to take the risk of any ordinary vicissitudes which may cause delay: *Thiss v. Byers* (1876) 1 Q. B. D. 244; 45 L. J. Q. B. 511.

company, having an option to pay in money or reinstate the building, elected to reinstate, but before they had done so the whole was pulled down by the authority of the Commissioners of Sewers as being in a dangerous condition; it was held that the company were bound by their election, and the performance of the contract as they had elected to perform it was not excused.⁴⁶ So again if a man contracts to do work according to orders or specifications given or to be given by the other contracting party, he is bound by his contract, although it may turn out not to be practicable to do the work in the time or manner prescribed. Plaintiffs contracted to erect certain farm buildings according to plans and specifications furnished to them, together with any alterations or additions within specific limits which the defendants might prescribe, and subject to penalties if the work were not finished within a certain time. And they expressly agreed that alterations and additions were to be completed on the same conditions and in the same time as the works under the original contract, unless an extension of time were specially allowed. It was held that the plaintiffs, having contracted in such terms, could not avoid the penalties for non-completion by showing that the delay arose from alterations being ordered by the defendants which were so mixed up with the original work that it became impossible to complete the whole within the specified time.⁴⁷ A contractor undertook to execute works according to specifications prepared by the engineer of a corporation. It turned out that an important part of the works could not be executed in the manner therein described and after fruitless attempts in which the plaintiff incurred much expense, that part had to be executed in a different way. It was held that no warranty could be implied on the part of the corporation that the plans were such as to make the work in fact reasonably practicable, and that the plaintiff could not recover as on such a warranty the value of the work that had been thrown away.⁴⁸ In short, it is admitted law that generally where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it, or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible.⁴⁹

⁴⁶ *Brown v. Royal Insurance Co.* (1859) 1 E. & E. 853; 28 L. J. Q. B. 275; 117 R. R. 492, *dis.* Erle J. who thought such a reinstatement as was contemplated by the contract (not being an entire rebuilding) had become impossible by the act of the law.

⁴⁷ *Jones v. St. John's College, Oxford* (1870) L. R. 6 Q. B. 115, 124; 40 L. J. Q. B. 80. The case was argued on demurrer, so that the agreement was admitted as pleaded. Such an agreement will not be implied, or inferred from ambiguous terms: *Dodd v. Churton* [1897] 1 Q. B. 563; 66 L. J. Q. B. 477, C. A.

⁴⁸ *Thorn v. Mayor of London* (1876) L. R. 9 Ex. 163; in Ex. Ch. 10 Ex. 112; *affid.* in H. L. 1 App. Ca. 120; 45 L. J. Ex. 487. *Qu.* whether, assuming the extra work not to have been of a kind contemplated by the contract itself, the plaintiff might have recovered for it on a *quantum meruit*; see 1 App. Ca. 128, 135.

⁴⁹ *Taylor v. Caldwell* (1863) 3 B. & S. 826, 833; 32 L. J. Q. B. 164, 166. This rule does not extend beyond express contracts. An undertaking to be answerable for delay

In *Barker v. Hodgson*⁶⁰ intercourse with the foreign port to which a ship was chartered was prohibited on account of an epidemic prevailing there, so that the freighter was prevented from furnishing a cargo; but it was held that this did not dissolve his obligation. So where the goods are confiscated at a foreign port that was held no answer to an action against the shipowner for not delivering them.⁶¹ The authority of these cases, however, is now doubtful.⁶² But where the act of a foreign local authority prevents both parties from performing their respective parts of the contract, both are excused.⁶³

It may be useful, even if superfluous for experienced readers, to note that cases of the last-mentioned class are apt to be complicated with other questions, and especially with doubts as to the proper law of the contract.⁶⁴

Where a contract is to be performed abroad the existence at the place of performance of a ground of excuse recognized by the local law, but not by English law, will be no discharge here unless it otherwise appears that the local law was intended to govern the parties' obligations.⁶⁵

ACT OF GOD &c

Generally it is still true that in our law (subject to the special incidents of certain contracts such as those of common carriers and bailees) "a person who expressly contracts absolutely to do a thing not naturally impossible is not excused from non-performance because of being prevented by *vis major*."⁶⁶ With regard to the term "*vis major*" and the English equivalent, "act of God" it is idle especially in the light of recent authorities to seek for general definition.⁶⁷ Such terms, and also the French "*force majeure*," now not uncommon in English commercial contracts,

caused by *vis major* or other causes beyond the contractor's control and apart from any default on his part, cannot be made part of an implied contract. *Ford v. Coleworth* (1870) 1 Ex. Ch. L. R. 5 Q. B. 544, 39 L. J. Q. B. 188 [distinguished in *Cantera Navale Trieste v. Handelsvertretung, &c.* [1925] 2 K. B. 172, 94 L. J. K. B. 579]. *Huk v. Raymond* [1893] A. C. 22, 62 L. J. Q. B. 98.

⁶⁰ 1814) 3 M. & S. 267, 15 R. R. 485, cp. *Jacobi v. Credit Lyonnais* (1884) 12 Q. B. Div. 589, 53 L. J. Q. B. 176, where the exportation of the cargo contracted for was forbidden by local law.

⁶¹ *Spence v. Chadwick* 1857 10 Q. B. 117, 16 L. J. Q. B. 313, 71 R. R. 417.

⁶² See [1920] 2 K. B. 201, 207, 303.

⁶³ *Cunningham v. Dunn* (1878) 3 C. P. Div. 443, *Ralli v. (as Navara)* [1920] 2 K. B. 287, 89 L. J. K. B. 909, C. A. [But in a charter-party, the exceptions clause relating to restraint of princes, rulers and people enures for the benefit of the shipowners only and does not extend to the charterers. *Cantera Navale Trieste v. Handelsvertretung, &c.* [1925] 2 K. B. 172, 94 L. J. Q. B. 579. As to the *Ralli* case, note its distinction in *Alenworth, Sons & Co. v. Ungarische, &c.* [1939] 2 K. B. 678, 108 L. J. K. B. 861.] If the making or execution of an agreement is forbidden by the law of the jurisdiction, performance, whether practicable or not, is unlawful, and the case comes under a different head—see chapter 8.

⁶⁴ As to this, see further, pp. 347-399.

⁶⁵ *Jacobi v. Credit Lyonnais*, note *supra*.

⁶⁶ *Ib.* 12 Q. B. Div. at p. 603 (Cur. per Bowen, 1 J.).

⁶⁷ *Vis major quam Ciceroni theod. Mar. appellant* D. 17 2, loc. cit., 25, § 6.

which is wider," have to be construed when parties make use of them by way of express exception, but their effect varies with the nature of the transaction." At all events the act of God does not include all inevitable accidents; contrary winds, for example, are not within the meaning of the term in a charter-party, for the risk of contrary winds, though inevitable, is one of the ordinary risks the parties must be understood to have before them and to take upon them in making such a contract: therefore it is said that the event must be not merely accidental, but overwhelming.⁶⁹ But on the other hand the term is not confined to unusual events: death, for example, is an "act of God" as regards contracts of personal service, because in the particular case it is not calculable. Yet the fact that this very event is not only certain to happen, but on a sufficiently large average is calculable, and therefore in one sense can be guarded against, is the foundation of the whole system of life annuities and life insurance.⁷⁰ Again, death is inevitable sooner or later, but may be largely prevented as to particular causes and occasions. The effects of tempest and of earthquake may be really inevitable by any precaution whatever. But fire is not inevitable in that sense. Precautions may be taken both against its breaking out and for extinguishing it when it does break out. We cannot arrive, then, at any more distinct conception than this: An event which, *as between the parties and for the purpose of the matter in hand*, cannot be definitely foreseen or controlled. In other words, we are thrown back upon the nature and construction of the particular contract⁷¹ to ascertain what risks each party was content to bear.

SPECIAL EXCEPTIONS

We now come to the exceptions. They are found in the following kinds of circumstances:—

A. Where the performance is required to be in person, death or disablement of the promisor.

B. Destruction, or failure of production, of the subject-matter.

C. Failure of assumed essential state of facts.

D. External interference of an extraordinary nature.

In such cases, with certain limitations and subject to a few peculiar survivals of narrower rules, a promisor is not presumed

⁶⁹ Cp. Code Civ. § 1148 (increase of the promisor's burden under a contract, short of impossibility, is not "force majeure," see note in ed. Dalloz); *Lebeaupin v. Crispin* [1920] 2 K. B. 714, 719; 89 L. J. K. B. 1024.

⁷⁰ [1920] 2 K. B. 720. Apprehension of a strike, even if reasonable, held not to amount to "force majeure"; *Hackney Borough Council v. Doré* [1922] 1 K. B. 431; 91 L. J. K. B. 109.

⁷¹ Per Martin B. *Oakley v. Portsmouth & Ryde Steam Packet Co.* (1856) 11 Ex. 618; 22 L. J. Ex. 99; 105 R. R. 684, 688.

⁷² As the medieval adage puts it, "Nihil morte certius, nihil incertius hora mortis."

⁷³ As to what is an "act of God" as will make an exception to a duty imposed not specially by contract but by the general law, see *Nichols v. Marsland* (1876) 2 Ex. Div. 1; 46 L. J. Ex. 174; *Nugent v. Smith* (1876) 1 C. P. Div. 423, 444; 45 L. J. C. P. 697; *Commissioners of Sewers v. Reg.* (1886) 11 App. Ca. 449.

to take the risk of inevitable accident frustrating the purpose of the contract.

A. CONTRACT FOR PERSONAL SERVICES CONDITIONAL ON CONTINUING ABILITY

A contract which can be performed only by the promisor in person is subject to the implied condition that he shall be alive to perform it, so that if he dies with the contract unperformed, his executor is not therefore liable to an action. This is long settled law.⁷² Conversely, if a contract for personal service does not mention assigns, and the master dies during the service, the servant is thereby discharged, and cannot treat the contract as in force against the master's personal representatives, for "personal considerations are of the foundation of the contract."⁷³ Later authorities have extended the principle to the case of the party becoming, without his own default, incapable of fulfilling the contract in his lifetime. In *Boast v. Firth*⁷⁴ a master sued the father of his apprentice on his covenant in the apprenticeship deed that the apprentice should serve him, the plaintiff, during all the term. The defence was that the apprentice was prevented from so doing by permanent illness arising after the making of the indenture. The Court held that "it must be taken to have been in the contemplation of the parties when they entered into this covenant that the prevention of performance by the act of God should be an excuse for non-performance,"⁷⁵ and that the defence was a good one. In *Robinson v. Davison*,⁷⁶ the defendant's wife, an eminent pianoforte player, was engaged to play at a concert. When the time came she was disabled by illness. The giver of the entertainment sued for the loss he had incurred by putting off the concert, and had a verdict for a small sum under a direction to the effect that the performer's illness was an excuse, but that she was bound to give the plaintiff notice of it within a reasonable time. The sum recovered represented the excess of the plaintiff's expenses about giving notice of the postponement to the public and to persons who had taken tickets beyond what he would have had to pay if notice had been sent by telegraph instead of by letter. The Court of Exchequer upheld the direction on the main point. The reason was thus shortly put by Bramwell B. "This is a

⁷² Pollock, C. B. in *Hall v. Wright* (1858) E. B. & E. at 793; 29 L. J. Q. B. at 51; 113 R. R. 891. [It is unlikely that this rule is affected by the Law Reform (Miscellaneous Provisions) Act, 1934 (24 and 25 Geo. 3, c. 41), s. 1, sub-s. 1 of which provides that on the death of any person all causes of action subsisting against, or vested in, him shall survive against or, as the case may be, for the benefit of his estate; for, where frustration of a contract applies, there is no cause of action left to survive, though the law does provide for the adjustment of rights and liabilities that have already accrued (*post*, pp. 248, 249.).]

⁷³ *Farrow v. Wilson* (1869) L. R. 4 C. P. 744; 38 L. J. C. P. 326.

⁷⁴ (1868) L. R. 4 C. P. 1; 38 L. J. C. P. 1.

⁷⁵ *Per Montague Smith J.* at 7.

⁷⁶ (1871) L. R. 6 Ex. 269; 40 L. J. Ex. 172.

contract to perform a service which no deputy could perform, and which in case of death could not be performed by the executors of the deceased: and I am of opinion that by virtue of the terms of the original bargain incapacity either of body or mind of the performer, without default on his or her part, is an excuse for non-performance."⁷⁷ The same judge also observed, in effect, that the contract becomes not voidable at the option of the party disabled from performance, but wholly void. Here the player could not have insisted "on performing the engagement, however ineffectually that might have been." when she was really unfit to perform it. The other party's right to treat the contract as annulled was afterwards established by a direct decision.⁷⁸ No positive opinion was expressed on the other point as to the duty of giving notice, but it may be taken as correct that it is the duty of the party disabled to give the earliest notice that is reasonably practicable, not necessarily notice reasonable in itself, for the disabling accident may be at the last moment, and the duty must be limited to cases where notice can be of some use.⁷⁹ It further appears from the case that the effect of an omission of this duty is that the contract remains in force for the purpose only of recovering such damage as is directly referable to the omission; and further, if express authority be required for it, that it matters not whether the disability be permanent or temporary, but only whether it is such as to prevent the fulfilment of the particular contract. In the event of the disabled party having suffered from breach of contract or negligence of a third person, and being entitled to a remedy against that person, a question of subrogation might possibly arise, but this does not appear to have been judicially considered.

In the earlier and very peculiar case of *Hall v. Wright*⁸¹ a majority of the Exchequer Chamber refused to apply this principle to the contract to marry. The question of substance was thus stated: "It is a term in an ordinary agreement to marry that if a man from bodily disease cannot marry without danger to his life, and is unfit for marriage from the cause mentioned at the time appointed, he shall be excused marrying then?"⁸² or in other words "Is the continuance of health, of such a state of health as makes it not improper to marry," an implied condition of the contract?⁸³ The majority relied upon two reasons: that if the man could not marry without danger to his life, that did not show the performance of the contract to be impossible, but at most highly imprudent; and that at any rate the contract could be so far performed as to give the woman the

⁷⁷ (1871) L. R. 6 Ex. at 277.

⁷⁸ *Poussard v. Spiers & Pond* (1876) 1 Q. B. D. 410; 45 L. J. Q. B. 621, where the only difficulty was on the findings of fact.

⁷⁹ Cp. the doctrine as to giving notice of abandonment to underwriters, *Rankin v. Potter* (1872-3) L. R. 6 H. L. 83, 121, 157; 42 L. J. C. P. 169.

⁸¹ (1858) E. B. & E. 746; 27 L. J. Q. B. 345; 10 Ex. Ch. E. B. & E. 765; 29 L. J. Q. B. 43; 113 R. R. 861, 874, by Willes, J., Crowder J., Martin B., Williams J. (with Lord Campbell C. J. and Crompton J. in the Q. B.) against Pollock C. B., Bramwell B. and Watson B. (with Wightman J. and Erle J. below).

⁸² Per Bramwell B., E. B. & E. 777.

⁸³ Per Pollock C. B. *ib.* 794.

status and social position of a wife. It was not disputed that the contract was voidable at her option.¹⁴ The canon law as to impediments was also discussed. With great respect this does not seem to afford any safe or useful analogy in an action at common law for damages. It is not easy to reconcile the decision with the principle affirmed in *Geipel v. Smith*,¹⁵ that when the main part of a contract has become impossible of performance by an accepted cause, it must be treated as having become impossible altogether. Moreover impossibility is not the real test, as now appears in the other classes of exceptional cases.¹⁶

Hall v. Wright "has been much observed upon"¹⁷ and has not been followed in American courts.¹⁸ At this day its authority here extends only to what it actually decided. To that extent it can be reviewed only in the House of Lords.

The rule now before us applies only to contracts for actual personal services. A contract of which the performance depends less directly on the promisor's health is not presumed to be conditional. If a man covenants to insure his life within a certain time, he is not discharged by his health becoming so bad before the end of that time as to make his life uninsurable.¹⁹ [If in a separation deed a husband covenants to pay a weekly sum to his wife for her maintenance during her life, and he dies before his wife, his estate is liable for the continuance of this payment.]²⁰ It has never been supposed that the current contracts of a manufacturing firm are affected in law by the managing partner being too ill to attend to business, though there are many kinds of business in which the proper execution of an order may depend on the supervision of a particular person. And in general terms it may be said that no contract which may be performed by an agent can be discharged by a cause of this kind, unless the parties have expressly so agreed. Further, it is a rule not confined (as we shall see) to contracts for personal services that the dissolution of a contract by frustration of its purpose does not affect any specific right already acquired under it. Where there is an entire contract of this kind for work to be paid for by instalments at certain times, any instalments which have become due in the contractor's lifetime remain due to his estate after the contract is put an end to

¹⁴ "The man, though he may be in a bad state of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position so far as in his power, though he may be unable to fulfil all the obligations of the marriage state; and it rests with the woman to say whether she will enforce or renounce the contract." The case is thus explained and distinguished by Montague Smith J. in *Boast v. Firth* (1868) L. R. 4 C. P. 8. It has long been settled that the contract to marry is so far personal that executors, in the absence of special damage to the personal estate, cannot sue upon it: *Chamberlain v. Williamson* (1814) 2 M. & S. 408, 15 R. R. 295. And they cannot, except perhaps for special temporal damage, be sued: *Finlay v. Churney* (1888) 20 Q. B. 494; 57 L. J. Q. B. 247. [If A breaks a promise to marry B, and B dies, damages are limited to the damage, if any, caused to B's estate; Law Reform (Miscellaneous Provisions) Act, 1934.]

¹⁵ (1872) L. R. 7 Q. B. 404; 41 L. J. Q. B. 153.

¹⁶ [Cf. *Gamble v. Sales* (1920) 36 T. L. R. 427.]

¹⁷ *Phillimore L. J. Jefferson v. Paskell* [1916] 1 K. B. 57, 70; 85 L. J. K. B. 398, C. A., a case mainly on the special facts, where the plaintiff was the temporarily disabled party.

¹⁸ *Arthur v. Wynn* (1880) 14 Ch. D. 603; 49 L. J. Ch. 557.

¹⁹ [*Kirk v. Eastace* [1937] A. C. 491; 106 L. J. K. B. 79.]

²⁰ [Williston, *Contracts*, § 1949.]

by his death." In like manner where a premium has been paid for apprenticeship, and the master duly instructs the apprentice for part of the term and then dies, his executors are not bound to return the premium or any part of it as on a failure of consideration."

B. DESTRUCTION OR FAILURE OF SUBJECT

The leading case on this head is *Taylor v. Caldwell*." The defendants agreed to let the plaintiffs have the use" of the Surrey Gardens and Music-hall on certain days for the purpose of giving entertainments. Before the first of those days the music-hall was destroyed by fire so that the entertainments could not be given, and without the fault of either party. The Court held that the defendants were excused, and laid down the following principle: "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any expressed or implied" warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to the implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.""

It is put more shortly near the end of the judgment: "In contracts [? of] which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.""

In *Appleby v. Myers*" the plaintiffs agreed with the defendant to erect an engine and other machinery on his premises, at certain

¹¹ *Stubbs v. Holywell Ry. Co.* (1867) L. R. 2 Ex. 311; 36 L. J. Ex. 166 (consulting engineer: the company contended that only the value of the work actually done was due).

¹² *Whincup v. Hughes* (1871) L. R. 6 C. P. 78; 40 L. J. C. P. 104; *Ferns v. Carr* (1885) 28 Ch. D. 409; 54 L. J. Ch. 578.

¹³ (1863) 3 B. & S. 826; 32 L. J. Q. B. 164; 129 R. R. 573. There were words sufficient for an actual demise, but the Court held that the manifest general intention prevailed over them. The plaintiffs were to provide the "stars," such as "Mr. Sims Reeves, God's will permitting," and the defendants the minor usual entertainments of which the reader may find a list in the report.

¹⁴ That is, understood in fact between the parties: the whole scope of the passage being that it is not to be implied by law.

¹⁵ 3 B. & S. at 833—834. The Court referred to the Roman law as to obligations "de certo corpore," D. 45. 1. de v. o. 23, 33. Cp. also D. 46. 3. de solut. 107. Verborum obligatio aut naturaliter resolvitur aut civiliter; naturaliter, veluti solutione, aut cum res in stipulationem, deducta sine culpa promissoris in rebus humanis esse desinit. Pothier, *Obl.* § 149, *ib.* Part 3, ch. 6, §§ 649 *sqq.*, and *Contrat de Vente*, § 308 *sqq.* translated in Blackburn on Sale, 173 (249 in 2nd ed. by Graham).

¹⁶ 3 B. & S. at 839.

¹⁷ (1867) L. R. 2 C. P. 651, in Ex. Ch. revg. s. c. 1 C. P. 615; 36 L. J. C. P. 331: applied in a towage case where it was held that the tug earned nothing when the vessel was accidentally stranded before the end of the journey: *The Madras* [1898] P. 90.

prices for the separate parts of the work, no time being fixed for payment. While the works were proceeding, and before any part was complete, the premises, together with the uncompleted works and materials upon them, were accidentally destroyed by fire. In the Common Pleas it was held that the plaintiffs might recover the value of the work already done as on a term to that effect to be implied in the nature of the contract. In the Exchequer Chamber the judgment of the Common Pleas was reversed. It was admitted that the work under the contract could not be done unless the defendant's premises continued in a fit state to receive it. It was also admitted that if the defendant had by his own default rendered the premises unfit to receive the work, the plaintiffs might have recovered the value of the work already done. But it was held that the Court below were wrong in thinking that there was an absolute promise or warranty by the defendant that the premises should at all events continue so fit. "Where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither." Another argument for the plaintiffs was that the property in the work done had passed to the defendant and was therefore at his risk." To this the Court answered that it was at least doubtful whether it had and even if it had, the contract was still that nothing should be payable unless and until the whole work was completed. A contractor for work to be paid for in a lump sum can recover for part only if he has been prevented from completing the work by the other party's default, or if there is a new contract to pay for what has been done."

Where there is an entire contract for doing work upon specific property, as fitting a steamship with new machinery, for a certain price, but the price is payable by instalments, and the ship is lost before the machinery has been delivered, but after one or more of the instalments has been paid, the further performance of the contract is excused, but the money already paid, though on account not of a part, but of the entire contract, cannot be recovered back.' [But see now the Law Reform (Frustrated Contracts) Act, 1943 (*post*, 248, *seq.*)]

⁹⁹ In the case cited in argument from Dalloz, *Jurisp. Gén.* 1861, pt. 1, 105, 106, *Chemin de fer du Dauphiné v. Clot* (1861), where railway works in course of construction had been spoilt by floods, the Court of Cassation relied on the distinction that they were not such as remained in the contractor's disposition till the whole was finished, but "de constructions dont les matériaux et la main-d'œuvre étaient fournis par l'entrepreneur et qui s'incorporaient au sol du propriétaire," as excluding the application of articles 1788-1790 of the Code Civil, which lay down a rule similar to that of the principal case.

¹⁰⁰ See *Forman & Co. v. Ship "Laddesdale"* [1900] A. C. 190, 202; 69 L. J. C. P. 41. In America, however, recovery for the work done is generally allowed: see Prof. Williston's note here in the American edition.

¹ *Anglo-Egyptian Navigation Co. v. Ramsse* (1875) L. R. 10 C. P. 271; 44 L. J. C. P. 190. It would seem the same on principle where the whole price is paid in advance. The destruction of a place of business does not discharge a continuing contract to

The same doctrine has been applied where the subject-matter of the contract is a future specific product or some part of it. In March A. agreed to sell and B. to purchase 200 tons of potatoes grown on certain land belonging to A. In August the crop failed by the potato blight, and A. was unable to deliver more than 80 tons: the Court held that he was excused as to the rest." "The contract was for 200 tons of a particular crop in particular fields . . . not 200 tons of potatoes simply, but 200 tons off particular land . . . and therefore there was an implied term in the contract that each party should be free if the crop perished."²

EXTENSION TO FAILURE OF ESSENTIAL CONDITIONS WITHOUT MATERIAL DESTRUCTION

The rule in *Taylor v. Caldwell* is now extended to cases where, without the destruction of any material object, a state of things contemplated by the parties as essential for performance according to their true intent fails to exist when the time for performance arrives, and this whether it is expressly mentioned in the terms of the contract or not.³ The principal group of cases arose out of the postponement, by reason of King Edward VII's illness, of the coronation procession appointed to take place in July, 1902. As in other cases of frustration by matter subsequent, the contract is not avoided *ab initio* when the failure of the condition assumed as its foundation is ascertained, but all outstanding obligations under it, and those only, are discharged; that is, any payment actually accrued due is still recoverable.⁴ If, however, the parties have contemplated and provided for any such contingency, no general rule is necessary or applicable, and there is nothing for the Court to do but to construe the special contract on an ordinary business footing.⁵

[With respect to the two preceding paragraphs, see now the Law Reform (Frustrated Contracts) Act, 1943; pp. 248, *seq.*]

A contract for the delivery of cargo to be shipped at Alexandria in a named ship during a certain month was held to be discharged by an accident to the ship which stranded her in the Baltic before the time for performance; in other words the contract was conditional on that ship continuing to exist as a cargo-carrying ship

carry on the business if it is capable of being resumed elsewhere: *Turner v. Goldsmith* [1801] 1 Q. B. 544; 60 L. J. Q. B. 247, C. A.

² *Howell v. Coupland* (1876) 1 Q. B. D. 258; 43 L. J. Q. B. 201, C. A. [For the meaning of "specific" goods in this case, see *Re Wait* [1927] 1 Ch. 606; 96 L. J. Ch. 179.]

³ In *Krell v. Henry* [1903] 2 K. B. 740; 72 L. J. K. B. 794, the agreement was for the hire of rooms, in fact to view the procession, but in terms it was unconditional: in *Chandler v. Webster* [1904] 1 K. B. 493; 73 L. J. K. B. 401, it was expressly "to view the first coronation procession"; *Civil Service Co-operative Society v. General Steam Navigation Co.* [1903] 2 K. B. 756; 72 L. J. K. B. 933, is an intermediate case. [The Judicial Committee in *Maritime National Fish, Ltd., v. Ocean Trawlers, Ltd.* [1935] A. C. 524, 529, said of *Krell v. Henry* that "the authority is certainly not one to be extended." Cf. *Mr. Landon* in 52 L. Q. R. (1936) 168-172.]

⁴ Per *Collins M.R.* [1904] 1 K. B. at 499; per *Romer L.J.* *ib.* at 501.

⁵ *Elliott v. Crutchley* [1906] A. C. 7; 75 L. J. K. B. 147.

available for the performance of the contract." But in a later case the Court of Appeal would not be persuaded that a ship chartered in the summer of 1902 for the purpose of conveying passengers to see the naval review intended to take place at Spithead had failed to exist "as a review-visiting ship," and that the charterer was discharged on that ground. It was the charterer's own venture and risk, and this was not altered by the nature of the intended voyage being specified.¹¹ In fact, the intended object, including as it did a cruise round the fleet, was not wholly frustrated, but this consideration does not seem necessary for the decision.

Where the condition alleged to be of the essence of the contract is not the definite fact of a specific thing existing or not existing, the application of the general principle becomes more difficult, as Lord Parker observed.¹² But the Court will not in any case entertain mere conjectures.

It will not impute to the parties reliance on particular facilities for the performance of the contract of which they or one of them knew nothing at the time, although they were in fact material and were displaced by inevitable accident. Parties cannot be deemed to contemplate conditions as essential of which they were not aware at all; for example, a seller's method of procuring the goods he undertakes to deliver, when the buyer neither knows nor concerns himself about it.¹³ Such a case is quite different from the failure of a mode of transport or the like, specially contemplated by the contract.

Many years ago it was decided, though the wide bearing of the reasons was not yet apparent, "that a delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and so long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end."¹⁴ This is important with reference to the impediments due to exercise of paramount public authority within or outside the jurisdiction which we shall presently consider. In *Horlock v. Beal*,¹⁵ for example, the opinions of the majority of the Lords expressly rely on this line of authority. Only in our own day it has converged with that which is derived from *Taylor v. Caldwell*. In the earlier maritime cases we find, as an

¹¹ *Nickoll & Knight v. Ashton* [1901] 2 K. B. 126; 70 L. J. K. B. 600.

¹² *Herne Bay Steamboat Co. v. Hutton* [1903] 2 K. B. 683; 72 L. J. K. B. 379.

¹³ *Tamplin S.S. Co. v. Anglo-Mexican Petroleum Co.* [1916] 2 A. C. at 423.

¹⁴ *Blackburn Bobbin Co. v. Allen* [1918] 2 K. B. 467; 87 L. J. K. B. 1085, C. A.

¹⁵ Lord Blackburn in *Dahl v. Nelson* (1881) 6 App. Cas. 38, 53, citing *Geipel v. Smith* (1872) L. R. 7 Q. B. 404; 41 L. J. Q. B. 153; *Jackson v. Union Marine Insurance Co.* (1874) L. R. 10 C. P. 125; 44 L. J. C. P. 27, Ex. Ch. . . see especially the judgment of Bramwell B. which does refer to the case of personal service as analogous, and to which, if to any one source, the doctrine of frustration may be traced; it is expressly approved by Lord Blackburn, *ubi sup.* See further McCordie J.'s critical survey of the authorities in *Blackburn Bobbin Co. v. Allen* [1918] 2 K. B. 540.

¹⁶ [1916] 1 A. C. 486; 85 L. J. K. B. 602.

able writer has observed, "a definitely maritime flavour" as of rules in special matter, and but little reference to the larger common law principles.¹⁷

C. FAILURE OF ASSUMED CONDITIONS AT DATE OF CONTRACT.

Like results may be produced by the non-existence at the date of the contract of a thing or state of things assumed to exist by the parties. In such cases performance is excused to the same extent and for the same reasons as if the failure of the assumed conditions had supervened. The simplest case is where the subject-matter of the agreement is some specific property or interest in property, but at the date of the contract there is nothing answering the description. This may be due to accident of which the parties are not yet informed, or merely to wrong information accepted by both. Either way there is a common mistaken assumption, and hence it has been usual to refer this class of cases to Mistake, or from a common law point of view to include them in the capacious rubric of Failure of Consideration. Neither way, however, is adequate or wholly correct. It was useful for equity practitioners, in the time of divided jurisdiction, to enlarge their borders under cover of a name already recognized in the Court of Chancery; but the only rational purpose of mentioning mistake in this connection is to exclude the supposition of fraud, which would induce new elements and call for a different mode of treatment. We proceed to give some typical examples.

In *Couturier v. Hastie*¹⁸ a bought note had been signed for a cargo of Indian corn described as "of fair average quality when shipped from Salonica." Several days before the sale, but unknown to the parties, the cargo, then on the voyage, was found to be so much damaged from heating that the vessel put into Tunis, where the cargo was sold. The only question seriously disputed was what the parties really meant to deal with, a cargo supposed to exist as such, or a mere expectation of the arrival of a cargo, subject to whatever might have happened since it was shipped. Lord Cranworth in the House of Lords, in accordance with the opinion of nearly all the judges, held that "what the parties contemplated, those who sold and those who bought, was that there was an existing something to be sold and bought." No such thing existing, there was no contract which could be enforced.

When a lessee under a mining lease covenants in unqualified terms to pay a fixed minimum rent, he is bound to pay it,"

¹⁷ McNair on Legal Effects of War, 1920, 86.

¹⁸ (1856) 5 H. L. C. 673; 25 L. J. Ex. 253; 101 R. R. 329. Under the Sale of Goods Act, 1893, s. 6, the perishing of a substantial part of a specific parcel of goods sold by an entire contract has the same effect as if the whole had perished: *Barrow, Lane & Ballard, Ltd. v. Philip Phillips & Co.* [1929] 1 K. B. 574; 98 L. J. K. B. 193.

¹⁹ *Marquis of Bute v. Thompson* (1844) 13 M. & W. 487; 17 L. J. Ex. 95; 67 R. R. 688. So in equity, *Ridgway v. Sneyd* (1854) Kay, 627; 101 R. R. 776.

though the mine may turn out to be not worth working or even unworkable. But it is otherwise with a covenant to work the mine or to raise a minimum amount. Where a coal mine was found to be so interrupted by faults as to be not worth working, it was said that the lessor might be restrained from suing on the covenant to work it on the terms of the lessee paying royalty on the estimated quantity of coal which remained unworked.²⁰ A similar question was fully dealt with in *Clifford v. Watts*.²¹ The demise was of all the mines veins, &c. of clay on certain land. There was no covenant by the lessee to pay any minimum rent but there was a covenant to dig in every vein of the vein not less than 1,000 tons not more than 2,000 tons of pipe or potter's clay. An action was brought by the lessor for breach of this covenant. Plea to the effect that there was not at the time of the demise or since so much as 1,000 tons of such clay under the lands that the performance of the covenant had always been impossible and that at the date of the demise the defendant did not know and had no reasonable means of knowing the impossibility. The Court held that upon the natural construction of the deed the contract was that the lessee should work out whatever clay there might be under the land and the covenant sued on was only a subsidiary provision fixing the rate at which it should be worked. The tenant could not be presumed to warrant that clay should be found and the result of a decision in favour of the plaintiff would be to give him a fixed minimum rent when he had not covenanted for it.

EXCEPTIONS IN COMMERCIAL CONTRACTS

Express exceptions providing against such events as we are considering are usual in several kinds of commercial and especially maritime contracts. The terms of these exceptions however are archaic and general and the Court has in substance to appeal to principle to settle their application. On the questions thus arising, which are really not ordinary questions of construction, certain points have been decided which have become part of the wider doctrine. Where the principle part of the contract becomes impracticable by an excepted risk, the parties are also discharged from performing any other part which remains possible, but is useless without that which has become impossible.²² It is a general principle that a contract is not to be

²⁰ *Ridgway v. Sneyd* last note.

²¹ (1870) L. R. 5 C. P. 577, 40 L. J. C. P. 36.

²² It was pleaded as an equitable plea under the C. L. P. Act, but the Court treated the defence as a legal one.

²³ Per Montague Smith J. L. R. 5 C. P. at 587. Cp. and dist. *Jervis v. Tomkinson* (1856) 1 H. & N. 195, 26 L. J. Ex. 41, 108 R. R. 516 where the covenant was not only to get 2,000 tons of rock salt per annum, but to pay 6d. a ton for every ton short, and the lessees knew of the state of the mine when they executed the lease. *Hills v. Sughrus*, p. 230 was decided on its peculiar facts. See L. R. 5 C. P. at 586, 589.

²⁴ *Gospel v. Smith* (1872) L. R. 7 Q. B. 404, 411, 41 L. J. Q. B. 153, [*White & Carter Ltd v. Carbus Bay Garage, Ltd* [1941] 2 All E. R. 633, C. A.]

treated as having become impossible of performance if by any reasonable construction it is still capable in substance of being performed:²⁵ but on the other hand special exceptions are not to be laid hold of to keep it in force contrary to the real intention. Thus where the contract is to be performed "with all possible despatch," saving certain impediments, the party for whose benefit the saving is introduced cannot force the other to accept performance after a delay unreasonable in itself, though due to an excepted cause, if the manifest general intention of the parties is that the contract shall be performed within reasonable time, if at all. The saving clause will protect him from liability to an action for the delay, but that is all: the other party cannot treat the contract as broken for the purpose of recovering damages, but he is not prevented from treating it as dissolved.²⁶

D. EXTRAORDINARY INTERFERENCE

Perhaps there is no very substantial distinction between frustration of an adventure by the exercise of human power or authority not contemplated by the contract and frustration by other kinds of inevitable accident. But "restraint of princes and rulers" is a familiar rubric among the express exceptions of mercantile instruments, and has now found its parallel in the modern doctrine of implied conditions. This development seems important enough to deserve a heading of its own. Its prominence dates only from the war, 1914—1918, but its origin goes back more than half a century. In *Baily v. De Crespigny*²⁷ a lessor covenanted with the lessee that neither he nor his heirs nor his assigns would allow any building (with certain small exceptions) on a piece of land of the lessor's fronting the demised premises. Afterwards a railway company purchased this piece of land under the compulsory powers of an Act of Parliament, and built a station upon it. The lessee sued the lessor upon his covenant; but the Court held that he was discharged by the subsequent Act of Parliament, which put it out of his power to perform it. And this was agreeable to the true intention, for the railway company coming in under compulsory powers, "whom he [the covenantor] could not bind by any stipulation, as he could an assignee chosen by himself," was "a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into." Nor was it material that the company was only empowered by Parliament, not required, to build a station at that particular place.²⁸ As the American phrase concisely puts

²⁵ *The Teutonia* (1872) L. R. 4 C. P. 171, 182; 41 L. J. Ad. 57. Cp. *Jones v. Holm* (1867) 1 L. R. 2 Ex. 335, [and *Hindley & Co., Ltd. v. General Fibre Co., Ltd.* [1940] 2 K. B. 517; 109 L. J. K. B. 857].

²⁶ *Jackson v. Union Marine Insurance Co.* (1874) 10 Ex. Ch. L. R. 10 C. P. 125, 144 sqq.; 44 L. J. C. P. 27.

²⁷ (1869) L. R. 4 Q. B. 180; 38 L. J. Q. B. 98.

²⁸ (1869) L. R. 4 Q. B. 186.

it, a covenant of warranty does not extend to the State in the exercise of its eminent domain." If a subsequent Act of Parliament making the performance of a contract impossible were a private Act obtained by the contracting party himself, he might perhaps remain bound by his contract as if he had made the performance impossible by his own act, but where the Act is a public one, its effect in discharging the contract cannot be altered by showing that it was passed at the instance of the party originally bound."

[The Judicial Committee have held that, where a party to a contract elects to act in such a way that his failure to comply with the requirements of a State department acting under statutory authority is due to his own fault, there is no frustration." This, indeed, is simply an application of the principle that frustration is a matter caused by something for which neither party was responsible." This rule, which had been recognized in earlier cases, was approved in *dicta* of the House of Lords in 1941 in *Joseph Constantine S.S. Ltd. v. Imperial Smelting Corporation, Ltd.*,²¹ where it was held that the burden of proving negligence or default is on the party who denies frustration, it is not necessary for the party who pleads frustration to prove that there was no negligence on his part. In this case the cause of the accident constituting frustration (an explosion on a ship) could not be definitely ascertained or attributed with certainty to any negligence of the party pleading frustration and the plea was held to be good.]

Note that the decision in *Bailly v. De Crespigny* was expressly based on broad grounds of principle" and so the Court of Appeal has held, as against the opinion on which the decision appealed from proceeded, namely, that the company taking the land under compulsory power was not the lessee's assign. The appeal was dismissed on the quite different ground that in the circumstances the risk of compulsory acquisition by the local authority was known to the defendants and must be taken as accepted by them."

²⁰ See *Osborn v. Nicholson* (1871) 13 Wall. at 657. [The case is reproduced in the Restatement of Contracts, § 457, illustration 2.] In England, however, the principle does not extend to relieving a lessee from liability on his covenants when the demised premises are accidentally destroyed by fire during a temporary occupation under compulsory powers. *Matther v. Curling* [1922] 2 A. C. 180, 61 L. J. K. B. 599.

²¹ *Brown v. Mayor of London* (1861) 9 C. B. N. S. 726, 30 L. J. C. P. 225, in Ex. Ch. 13 C. B. N. S. 828, 31 L. J. C. P. 280.

²² [*Maritime National Fish, Ltd. v. Ocean Traders, Ltd.* (1945) A. C. 523, 104 L. J. C. P. 88.]

²³ [Cited in [1935] A. C. at 531 from another decision of the Judicial Committee in *Hup Mulji v. Cheong Yee S.S. Co.* [1926] A. C. 497, 507. So, too, Lord Blackburn in the House of Lords' decision, *Dahl v. Nelson & Co.* (1881) 6 App. Ca. 38, 53, and Lord Sumner in *Bank Line, Ltd. v. Capel & Co.* [1918] A. C. 435, 452.]

²⁴ [[1942] A. C. 154, 161-162, 171, 178, 189-190 199-200. Prof. Stone comments on the decision in 60 L. Q. R. 262-284.]

²⁵ See the passage cited, p. 243.

²⁶ *Walton Harvey, Ltd. v. Walker & Humphreys, Ltd.* [1931] 1 Ch. 274 (for the disallowed opinion, see the report below, *ib.* at 159); 100 L. J. Ch. 93.

In recent years not only the operations of war (already a regular subject of express exception ever since the framework of mercantile contracts was settled in its current form¹⁰), but domestic acts of executive authority conferred for war purposes have had like effects.

In *Metropolitan Water Board v. Dick, Kerr & Co.*¹¹ the defendants had contracted with the plaintiff Board in 1914-5 to construct a reservoir, providing all necessary plant and labour. The Minister of Munitions, in exercise of authority conferred by the Defence of the Realm Acts and Regulations, ordered the work to be stopped in 1916, and directed the removal and sale to munition factories of a large part of the plant. In 1916 the Water Board sued for (*inter alia*) a declaration that the contract was still binding. The House of Lords held that the interruption was clearly beyond the contemplation of the parties and, being for an undefined and unascertainable length of time, must be regarded as a total frustration of the undertaking. The contract was therefore dissolved and not merely suspended.

In *Horlock v. Beal*¹² the question was whether the owner of a British ship was liable for the seamen's wages after the ship had been detained at Hamburg and the crew interned in Germany, of which events the first happened on the declaration of war (August 4, 1914) and the second about two months later. The House of Lords held, against a majority in the Court of Appeal, that the further performance of the service became impossible in a commercial sense as from August 4,¹³ and thenceforth no more wages were due.

Soon after this decision the House, agreeing with the Court of Appeal by a majority of three to two,¹⁴ held that a time charter-party for sixty months from December, 1912, the charterers being free to sublet for Admiralty or other service, was not determined or suspended when the Admiralty requisitioned the vessel for transport purposes. In the view of the majority there was no substantial frustration of the parties' common purpose by a cause outside their contemplation, nor indeed any definite common adventure at all: the owners were not concerned in the charterers

¹⁰ [In interpreting "war," the C. A. has recently taken account of the fact that, at any rate for the purpose of excepted risks in a charter-party, it is possible for war to exist *de facto*, although the formal view of H.M. Government may be otherwise: *Kawasaki, &c. v. Bantam Steamship Co., Ltd.* [1939] 2 K. B. 544; 108 L. J. K. B. 709.]

¹¹ [1918] A. C. 119; 87 L. J. K. B. 370.]

¹² [1916] 1 A. C. 486; 85 L. J. K. B. 602. Lord Parmoor dissented for reasons confined to this particular species of contract. [*Unger v. Preston Corporation* [1942] 1 All E. R. 200.]

¹³ So Lord Atkinson, Lord Shaw of Dunfermline, and Lord Wrenbury; Lord Loreburn thought the decisive date was Nov. 2.

¹⁴ *Tamplin S.S. Co. v. Anglo-Mexican, &c. Co.* [1916] 2 A. C. 397; 85 L. J. K. B. 1389. Lord Buckmaster, Lord Loreburn and Lord Parker; Lord Haldane and Lord Atkinson dissenting.

doing any specific thing beyond payment of freight, and the charterers were not bound to use the ship at all. Doubtless the Admiralty requisition was a restraint of princes, but by the express terms of the contract that was not enough to suspend the payment of freight.⁴¹

The principle of frustration, however, may apply to a time charter in more appropriate circumstances, and has been so applied by the House of Lords itself.⁴²

There is no rule of law against applying the doctrine to a contract for the sale of unascertained goods, and it may be so applied when the occasion calls for it, though such occasions cannot be frequent.⁴³

Further, it is to be observed that the disturbing cause must go to the extent of substantially preventing the performance of the contract as a whole. Interference leaving a considerable part capable of performance will not be an excuse. A gas company's contract with the local authority for provision and maintenance of lamps and burners and lamplighting, as well as the supply of gas, was not determined when the lighting of the lamps was forbidden, for military reasons, by an order under the Defence of the Realm Regulations.⁴⁴ The terms of the contract provided for a fixed quarterly payment calculated according to the number of lamps, but covering the whole of the company's undertaking, so that it was not possible to say what proportion of it was intended to be in respect of actual gas consumption. Moreover, full performance of the contract could be resumed as well as ever on the removal of the military restriction.

On much the same principle the lessee of a residential flat who became an alien enemy during the tenancy, and under the war regulations was forbidden to live there, was not discharged from his obligation to pay rent. He remained free to sub-let, and continuance of his liberty to use the flat in person was not an essential condition of the contract.⁴⁵ [The question whether the doctrine of frustration can ever be applicable to leases was considered by the House of Lords in *Cricklewood Property, &c., Ltd. v. Leighton's Investment Trust, Ltd.*⁴⁶ The actual decision was that the doctrine did not apply to the particular lease in this case, but the more general question was considered in *obiter dicta*

⁴¹ See especially Lord Parker's judgment [1916] 2 A. C. at 426.

⁴² *Bank Line v. Capel* [1919] A. C. 435; 88 L. J. K. B. 211, where the charter was for twelve months only.

⁴³ Russell J. *Re Badische Co., Ltd.* [1921] 2 Ch. 331, 380, 381; 91 L. J. Ch. 133. Here the parties in question were held to have "contracted on the footing that peace would continue to exist between the country of the contracting parties and the country of the source of supply, and that the source of supply would remain open."

⁴⁴ *Leiston Gas Co. v. Leiston U.D.C.* [1916] 2 K. B. 428; 85 L. J. K. B. 1759, C. A. Details of the contract are in the report below [1916] 1 K. B. 912.

⁴⁵ *London and Northern Estates Co. v. Schlesinger* [1916] 1 K. B. 20; 85 L. J. K. B. 360. See, too, *Swift v. Macbean* [1942], 1 K. B. 375.

⁴⁶ [1945] A. C. 221.]

and unfortunately the House was equally divided on the answer to it.⁴⁷

[An example of a contract in which the frustrating event left no part of the contract capable of being performed is *Denny, Mott & Dickson, Ltd. v. James B. Fraser & Co., Ltd.* [1944] A.C. 265 (H.L.).]

It is not practicable here to discuss at large the facts proper to classes of cases, or peculiar to individual cases, on which the decisions have turned, nor to criticize the many and various forms in which the doctrine has been judically expressed in different cases and sometimes in one and the same case. A collection of these utterances was made by Lord Sumner in the *Bank Line case*.⁴⁸ It is certain that some of the *dicta* even in the House of Lords are in their literal terms too wide.⁴⁹ Only beginners in the law need to be warned that the wording of even the most learned judicial expositions must not be treated as authoritative without careful attention to the context and to the questions actually decided.

[ADJUSTMENT OF RIGHTS AND LIABILITIES OF THE PARTIES TO A FRUSTRATED CONTRACT]

[As has been already stated, the parties to a frustrated contract are released from any further fulfilment of the obligations created by it. Until recently, it was also the law that any payment that had been made in pursuance of the contract prior to the moment of frustration was irrecoverable. This was commonly known as the rule in *Chandler v. Webster*,⁵⁰ the case in which it was laid down by the Court of Appeal. It operated harshly in so far as it prevented the recovery of any payment already made for which in fact no value had been received.⁵¹ It was inconsistent with Scots Law⁵² and with modern Roman Law,⁵³ and it encountered much criticism in later cases. The Lord Chancellor's Law Revision Committee in 1939 recommended its abolition.⁵⁴ In 1942, the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*,⁵⁵ overruled *Chandler v. Webster*. The

⁴⁷ [Viscount Simon, L.C. and Lord Wright were of opinion that in certain circumstances the doctrine might apply; Lords Russell of Killowen and Goddard considered that it never could apply; Lord Porter reserved the point. On the whole, we find the arguments of Viscount Simon and Lord Wright the more convincing].

⁴⁸ [1919] A. C. at 457.

⁴⁹ E.g., Lord Loreburn's in *Tamplin's case* [1916] 2 A. C. at 405.

⁵⁰ [[1904] 1 K. B. 493; 73 L. J. K. B. 401].

⁵¹ [E.g., *Civil Service Co-operative Society, Ltd. v. General Steam Navigation* [1903]. 2 K.B. 756; 72 L. J. K. B. 933; *Lloyd Royal Belge S.A. v. Stathatos* (1917) 33 T. L. R. 390; 34 T. L. R. 70.]

⁵² [*Cantare San Rocco v. Clyde Shipbuilding and Engineering Co.* [1924] A. C. 226; 93 L. J. P. C. 86. It was also contrary to many decisions in American law; Williston Contracts, §§ 1954, 1974; Restatement of Contracts, § 468].

⁵³ [Prof. W. W. Buckland in 46 Harvard Law Review, 1281 seq.]

⁵⁴ [Cmd. 6009].

⁵⁵ [[1943] A. C. 32; 111 L. J. K. B. 433].

following were the facts. A contracted to manufacture and deliver to B certain machinery, part of the price to be paid in advance. B accordingly paid £1,000. Further performance of the contract was frustrated for reasons connected with the European war. Held B was entitled to recover the £1,000 as upon a total failure of consideration and that the foundation of his right to do so was quasi-contract, not contract. *Chandler v Webster* was regarded as wrongly decided because—(1) the Court had treated the claim as based on contract, (2) Collins, M. R. had mistakenly held that the doctrine of failure of consideration was inapplicable unless the contract were wiped out altogether, but this was wrong, because frustration although it releases the parties from further fulfilment of the contract does not efface it *ab initio*. It is important to add that the House of Lords clearly recognized the rule that money paid cannot be recovered where the true interpretation of the contract is that the parties intended the money to be paid out and out even if frustration ensues, e.g. where a contract, under which a spectator is admitted to a cricket match, stipulates that no money shall be returned if bad weather prevents the match from being played. The House also recognized that custom may bring about the same result as in the long established rule that freight paid in advance is not recoverable if the completion of the voyage is frustrated.

The decision in the *Fibrosa* case was necessarily confined to the facts before the Court and the House of Lords itself admitted that there were other aspects of adjustment of the rights and liabilities of the parties which ought to be dealt with by the legislature. Hence, shortly afterwards the Law Reform (Frustrated Contracts) Act, 1933 (6 & 7 Geo. 6, c. 30) extended considerably the principle of the *Fibrosa* case, that decision is not entirely superseded by the Act for there are cases expressly excepted from its operation to which nevertheless the decision may apply. We must refer briefly to the main provisions of the Act* and, as abridgment of sect. 1, sub-sec. 1, 2, 3, is difficult they are given *in extenso*.

(1) Where a contract" governed by English law" has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract the following provisions of this section shall, subject

* [See Viscount Simon, L. C.'s analysis of the reasons which led to the M. R.'s fallacy [1943] A. C., at p. 48.]

²⁷ [*Byrne v Schiller* 1871) L. R. 6 Ex. 319, 40 L. J. Ex. 177. *Allison v Bristol Marine Insurance Co.* 1875, 1 App. Cas. 209, 253.]

²⁸ [An excellent commentary upon it is that by Sir Arnold McNair in 60 L. Q. R. 160-174. See also a short monograph on it by Dr. Glanville Williams, "Law Reform (Frustrated Contracts) Act, 1933."]

²⁹ [This includes a contract to which the Crown is a party, sect. 2, sub-sec. 2.]

³⁰ [This includes not only contracts to which English law unquestionably applies but also cases where, under the Conflict of Laws, English law must be applied to the contract, for the rules as to such cases, see Dicey, Conflict of Laws (5th ed.), Rules 155, 160, 162.]

to the provisions of section two of this Act, have effect in relation thereto.

(2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as "the time of discharge") shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be payable:

Provided that, if the party to whom the sums so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sum so paid or payable, not being an amount in excess of the expenses so incurred.

(3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular,—

(a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and

(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

Sub-sect. 1 above appears to regard impossibility as a species of frustration, and perhaps impossibility here refers to physical impossibility like the destruction of a thing, the existence of which is essential to performance of the contract; e.g., the music-hall in *Taylor v. Caldwell* (*ante*, 237). There is no doubt, however, that "frustration" covers all the forms of discharge created by its occurrence, which have been discussed in the foregoing pages. The first paragraph of sub-sect. 2 embodies the *Fibrosa* decision and follows it in making quasi-contractual obligation the basis of recovery of the payment. The second paragraph and sub-sect. 3 go considerably farther than the *Fibrosa* case in taking account of other facts that call for adjustment of the relations of the parties. An instance of a "valuable benefit" referred to in sub-sect. 3 would be where, during the war, A., a famous singer, contracts to perform at B.'s concert-hall for a month, payment of A.'s stipend to be made weekly, and before the first week expires. A. is killed by enemy action. Here B. has received a "valuable benefit" in the performances already given by A., and A.'s personal representatives could claim accordingly the value of the benefit, but subject to deduction, under sub-sect. 3 (a), of any expenses incurred by B. in making all necessary arrangements

for A.'s share in the concerts. Deduction would also be made of any money which B. has had to pay to C. who, under a separate contract with B., had acted as the piano accompanist of A.

Sect. 1, sub-sect. 4, enables the Court to make allowance for "overhead expenses and in respect of any work or services performed personally." There is no definition of "overhead expenses," but the term is well understood in business circles and would certainly include ordinary office expenses incurred in connexion with the contract.

Sect. 1, sub-sect. 5, excludes from the cognizance of the Court sums which have, owing to the frustration of the contract, become payable to a party under any contract of insurance, unless there was an obligation to insure which was expressly required by the frustrated contract, or by any enactment. An instance of such an enactment would be compulsory insurance under the War Damage Acts."

Sect. 1, sub-sect. 6, provides that "where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the Court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of sub-section (3) of this section [*supra*] any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid." Such would be the case of A. apprenticing his son, before the outbreak of war, to B. for three years, in consideration of the payment of £300 by A. to B. at the end of that period, and the son being called up for service in His Majesty's forces after two years. As he has already received the benefit of two years' instruction from B., the Court can allow B. to recover the value of that instruction from A."

If there is a provision in the contract which is intended to take effect on frustration, or independently of frustration, the Court shall give effect to it and shall apply the Act only to the extent to which it is consistent with the provision; sect. 2, sub-sect. 3: and if the contract is severable and a severable part of it has been performed, the Court shall treat that part of the contract as if it were a separate contract and had not been frustrated; sect. 2, sub-sect. 4."

The following contracts are expressly excluded from the operation of the Act by sect. 2, sub-sect. 5. (a) Any charter-party (except a time charter-party or a charter-party by way of demise), or any contract (other than a charter-party) for the carriage of

⁴⁴ [McNair, 60 L. Q. R. 167—168, where the learned author notes that, if the insurance is voluntary, although the court cannot take it into account, the insurer, if he has paid the loss, will be subrogated to the payee's rights against the other party].

⁴⁵ [McNair, *ibid.*, 168].

⁴⁶ [To some extent the principle of this sub-section was recognized at Common Law: e.g., *Egham & Staines Electricity Co., Ltd., v. Egham U.D.C.* [1944] 1 All E. R. 107 (H.L.)].

goods by sea. (b) Any contract of insurance save as is provided in sect. 1, sub-sect. 5 (*ante*). (3) Any contract to which the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 7 (which avoids contracts for the sale of specific goods that perish before the risk has passed to the buyer) applies, or any other contract for the sale of specific goods, where the contract is frustrated because the goods have perished.

The Act applies to contracts, whether made before or after the commencement of the Act (August 5th, 1943), if the time of discharge is on or after July 1st, 1943 (sect. 2, sub-sect. 1). If the time of discharge is earlier than July 1st, and the facts fall within the *Fibrosa* decision, that case presumably would apply, though the Act would not.

A notable feature of the Act is the large amount of discretion that it confers on the Court (or arbitrator, if there is one; sect. 3, sub-sect. 2). One consequence of this is that an appellate court is unlikely, apart from exceptional cases, to interfere with the adjustment made by a trial judge "]

CONSTRUCTION OF CONDITIONS IN BONDS

This kind of instruments being archaic, their construction is still governed by peculiar and archaic rules, which however there is no occasion to apply in practice at this day, as such questions cannot well occur upon any form of bond still in use. It is however thought proper to retain the statement of these rules for reference at need, and it does not seem useful (even if it would be safe) to attempt any revision of the language, the subject-matter itself being antiquated.

A bond is in form a contract dependent on a negative condition (cp. p. 218). First the obligor professes to be bound to the obligee in a sum of a certain amount. Then follows the condition, showing that if a certain event happens (generally something to be done by the obligor) the bond shall be void, but otherwise it shall remain in force. "The condition is subsequent to the legal obligation, if the condition be not fulfilled the obligation remains"⁴⁷ This is in terms a promise, stated in a singularly involved way, to pay a sum of money if the event mentioned in the condition does not happen. But this, as everybody knows, is not the true nature of the contract. The object is to secure the performance of the condition, and the real meaning of the parties is that the obligor contracts to perform it under the conventional sanction of a penal sum. This view is fully recognized by the modern statutes regulating actions on bonds, by which the penalty is treated as a mere security for the performance of the contract or the payment of damages in default.⁴⁸ On principle, therefore, a bond with an impossible condition, or a condition which becomes impossible, should be dealt with just as if it were a direct covenant to perform that which is or becomes impossible. In the former case the bond should be void, in the latter the rule in *Taylor v. Cald-*

⁴⁷ [McNair, *ibid.* 174].

⁴⁸ Sir W. W. Follett, *arg.* *Beswick v. Swindells* (1835) 3 A. & E. 873; 53 R. R. 200.

⁴⁹ As to these, see *Preston v. Dania* (1872) L. R. 8 Ex. 19; 42 L. J. Ex. 33.

*well*³⁰ would determine whether it were avoided or not. We shall see (Ch. 8) that where the condition is *illegal* our Courts have found no difficulty in considering the bond as what in truth it is: an agreement to do the illegal act. But in the case of impossibility the law has stuck at the merely formal view of a bond as a contract to pay the penal sum, subject to be avoided by the performance of the condition, accordingly if the condition is impossible either in itself or in law the obligation remains absolute.

"If a man be bound in an obligation, &c., with condition that if the obligor do go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, that then the obligation shall be void. The condition is void and impossible and the obligation standeth good." So again, if the condition is against a maxim or rule in law, as "if a man be bound with a condition to enfeoff his wife, the condition is void and against law, because it is against the maxim in law and yet the bond is good."

In the same way, "when the condition of an obligation is so insensible and uncertain that the meaning cannot be known there the condition only is void and the obligation good."

On the point of subsequent impossibility, however, the strictly formal view is abandoned and an opposite result arrived at, but still in an artificial way. The condition it is said is for the benefit of the obligor and the performance thereof shall save the bond, therefore he shall not lose the benefit of it by the act of God," and where the condition is possible at the date of the instrument "and before the same can be performed the condition becomes impossible by the act of God, or of the law, or of the obligee, there the obligation is saved,"³¹ or as another book has it, "the obligation and the condition both are become void."³² "Generally if a condition that was possible when made is become impossible by the act of God, the obligation is discharged."³³ As to the acts of the law and of the obligee this agrees with the doctrine of contracts in general, as to inevitable accident it establishes a different rule. The decision in *Laughter's case*³⁴ was an application of the same view, and it therefore appears that there should never have been any question of extending it to direct covenants or contracts.

The peculiar law thus laid down is distinctly recognized by modern authorities.³⁵ However, if a bond appears on the face of it to be given to secure the performance of an agreement which it recites, the condition will take effect according to the true intention of the agreement rather than the technical construction resulting from the form of the instrument.³⁶

Alternative conditions, at any rate as to immediate impossibility, and conditions made impossible by the default of the parties or otherwise than by the "act of God," are treated in the same way as direct promises.

"When a condition becomes impossible by the act of the obligor, such impossibility forms no answer to an action on the bond."³⁷

³⁰ (1863) 3 B. & S. 826, p. 237.

³¹ (4) Lit. 206 b (some of the &c.'s in Coke's text are omitted). To the same effect, Shepp. Touchst. 372. As to going to Rome the more usual phrase in the old books is three days, which is now inapplicable.

³² Shepp. Touchst. 373.

³³ This reasoning appears both in *Laughter's case* (1595) 5 Co. Rep. 21 b, and *Lamb's case* (1599), ib. 23 b.

³⁴ Co. Lit. 206 a.

³⁵ Ro. Ab. 1, 449, G. pl. 1, repeated on 451, I. pl. 1.

³⁶ 1 Wms. Saund. 238; per Williams J. *Brown v. Mayor of London* (1861) 9 C. B. N. S. 726, 747; 30 L. J. C. P. 225, 230.

³⁷ *Baswick v. Sunndells* (1835) Ex. Ch. 9 A. & E. 868; 53 R. R. 196.

³⁸ Per Cur. *Baswick v. Sunndells*, 3 A. & E. at 889; 53 R. R. 207.

"When the condition of an obligation is to do two things by a day, and at the time of making the obligation both of them are possible, but after, and before the time when the same are to be done, one of the things is become impossible by the act of God, or by the sole act and laches of the obligee himself; in this case the obligor is not bound to do the other thing that is possible, but is discharged of the whole obligation. But if at the time of making of the obligation one of the things is and the other of the things is not possible to be done, he must perform that which is possible. And if in the first case one of the things become impossible afterwards by the act of the obligor or a stranger, the obligor must see that he do the other thing at his peril." "If the condition be that A. shall marry B. by a day, and before the day the obligor himself doth marry her; in this case the condition is broken. But if the obligee marry her before the day, the obligation is discharged."⁶¹

"If a man is bound to me in 20*l.* on condition that he pay me 10*l.*, in that case if he tender me the money and I refuse he is altogether excused from the obligation, because the default is on my part who am the obligee."⁶²

⁶¹ Shrepp, Touchst. 382, 392.

⁶² Brian C. J. 22 Ed. IV. 26.

8

UNLAWFUL AGREEMENTS

DIVISION OF THE SUBJECT

We have already seen that an agreement is not in any case enforceable by law without satisfying sundry conditions— as being made between capable parties, being sufficiently certain and the like. If it does satisfy these conditions, it is in general a contract which the law commands the parties to perform. But there are many things which the law positively commands people not to do. The reasons for issuing such commands, the weight of the sanctions by which they are enforced, and the degree of their apparent necessity or expediency, are exceedingly various, but for the present purpose unimportant. A murder, the obstruction of a highway, and the sale of a loaf otherwise than by weight, are all on the same footing in so far as they are all forbidden acts. If the subject matter of an agreement be such that the performance of it would either consist in doing a forbidden act or be so connected therewith as to be in substance part of the same transaction, the law cannot command the parties to perform that agreement. It will not always command them not to perform it, for there are many cases where the performance of the agreement is not in itself an offence, though the complete execution of the object of the agreement is— but at all events it will give no sort of assistance to such a transaction. Agreements of this kind are void as being *illegal* in the strict sense.

Again, there are certain things which the law¹ does not forbid in the sense of attaching penalties to them, but which are violations of established rules of decency, morals, or good manners, and of whose mischievous nature in this respect the law so far takes notice that it will not recognize them as the ground of any legal rights. Agreements whose subject matter falls within this description are void as being *immoral*.

Further, there are many transactions which cannot fairly be brought within either of the foregoing classes, and yet cannot conveniently be admitted as the subject matter of valid contracts, or can be so admitted only under special restrictions. They seem in the main to fall into the following categories.

Matters governed by reasons outside the regular scope of municipal law, and touching the relations of the commonwealth to foreign states.

¹ *I.e.*, the common law. But *quæ* whether the common law could take notice of anything as immoral which would not constitute an offence against either common or ecclesiastical law.

Matters touching the good government of the commonwealth and the administration of justice:

Matters affecting particular legal duties of individuals whose performance is of public importance.

Things lawful in themselves, but such that individual citizens could not without general inconvenience be allowed to set bounds to their freedom of action with regard to those things in the same manner or to the same extent as they may with regard to other things.² Agreements falling within this description are void as being *against public policy*.³

We have then in the main three sorts of agreements which are unlawful and void, according as the matter or purpose of them is—

1. Contrary to positive law. (*Illegal*.)
2. Contrary to positive morality recognized as such by law. (*Immoral*.)
3. Contrary to the common weal as tending
 - A. To the prejudice of the State in external relations.
 - B. To the prejudice of the State in internal relations.
 - C. To improper or excessive interference with the lawful action of individual citizens. (*Against public policy*.)

This division applies to the reasons which determine the law to hold the agreement void, not to the nature or operation of the law itself: the nullity of the agreement is in every case a matter of positive law. Bearing this in mind, it is convenient to speak of the agreement itself as contrary to positive law, to morality, or to public policy, as the case may be.

The arrangement here given is believed to represent distinctions which are in fact usually recognized in our Courts. But like all classifications it is only approximate: and where the field of judicial discretion is so wide as it is here (for nowhere is it wider) we must expect to find many cases which may nearly or quite as well be assigned to one place as to another.⁴ Some positive rules for the construction of statutes have been worked out by a regular series of decisions. But with this exception we find that the case-law on most of the branches of the subject presents itself as a

² We have already seen that the specific operation of contract is none other than to set bounds to the party's freedom of action as regards the subject-matter of the contract.

³ [The author takes a narrower view of the scope of public policy than the Courts have done, but, as he himself states above, his classifications are only approximate. See next note.]

⁴ [Notable instances of this are two recent decisions of the House of Lords: *Fender v. St. John-Mildmay* [1938] A. C. 1 (p. 267), and *Beresford v. Royal Insurance Co., Ltd.* [1938] A. C. 586 (p. 258), both of which were decided on Pollock's third ground (public policy), although both are cognate, according to the context of his book, to the first of his headings (agreements contrary to positive law). They have accordingly been treated in this edition under the first heading so far as their classification goes, but their general bearing on public policy is considered under that topic (pp. 289—291).]

clustered group of analogies rather than a linear chain of authority. We have then to select from these groups a certain number of the more central instances. The statement of the general rules which apply to all classes of unlawful agreements indifferently will be reserved, so far as practicable, until we have gone through the several classes.

1. AGREEMENTS CONTRARY TO POSITIVE LAW CRIMINAL

The simplest case is an agreement to commit a crime or indictable offence.

If one bind himself to kill a man, burn a house, maintain a suit, or the like, it is void.

With very few exceptions obviously criminal agreements do not occur in our own time and in civilised countries, and at all events no attempt is made to enforce them. In the eighteenth century a bill was filed on the Equity side of the Exchequer by a highwayman against his fellow for a partnership account. The bill was reported to the Court both scandalous and impertinent, and the plaintiff's solicitors were fined and his counsel ordered to pay costs.¹ *Quære* whether the law will recognize a partnership even in an occupation which is discouraged by law though not actually punishable, such as bookmaking.² The question may arise, however, whether a particular thing agreed to be done is or is not an offence, or whether a particular agreement is or is not on the true construction of it an agreement to commit an offence. In the singular case of *Mayor of Norwich v. Norfolk Ry. Co.*,³ the defendant company, being authorized to make a bridge over a navigable river at one particular place, had found difficulties in executing the statutory plan, and had begun to build the bridge at another place. The plaintiff corporation took steps to indict the company for a nuisance. The matter was compromised by an arrangement that the company should not discontinue their works but complete them in a particular manner intended to make sure that no serious obstruction to the navigation should ensue, and an agreement was made by deed in which the company covenanted to pay the corporation 1000*l.* if the works should

¹ Shepp. Touchst. 370.

² Lindley on Partnership, 10th ed., 117. See 1 Q. R. ix, 19, for an account of the case *Everet v. Williams*, verified from the originals in the Record Office.

³ Fletcher Moulton L. J. in *Hyams v. Stuart King* [1908] 2 K. B. at 718, 771, J. K. B. 794, followed, *O'Connor v. Ralston* [1920] 1 K. B. 451, 90 L. J. K. B. 261, not followed by McCardie J. *Jeffrey v. Bamford* [1921] 2 K. B. 351. [In *Humphrey v. Wilson* (1929) 141 L. J. 466, Lord Hewart C. J. agreed with McCardie J. His decision was affirmed by the C. A. without express reference to this, but it is difficult to see how they could have affirmed the L. C. J. if they had held the view that a bookmaking partnership is unlawful.]

⁴ [See *Thorne v. M. F. A.* [1937] A. C. 797, and Prof. Goodhart, *Essays*, ch. ix.]
[1855] 4 E. & B. 397, 24 L. J. Q. B. 105, 90 R. R. 518.

not be completed within twelve months, whether an Act of Parliament should within that time be obtained to authorize them or not. The corporation sued on this covenant, and the company set up the defence that the works were a public nuisance, and therefore the covenant to complete them was illegal. The Court of Queen's Bench was divided on the construction and effect of the deed. Erle J. thought it need not mean that the defendants were to go on with the works if they did not obtain the Act. "Where a contract is capable of two constructions, the one making it valid and the other void, it is clear law the first ought to be adopted." Here it should be taken that the works contracted for were works to be rendered lawful by Act of Parliament. Coleridge J. to the same effect: he thought the real object was to secure by a penalty the speedy reduction of a nuisance to a nominal amount, which was quite lawful, the corporation not being bound to prosecute for a nominal nuisance. Lord Campbell C.J. and Whiteman J. held the agreement bad, as being in fact an agreement to continue an existing unlawful state of things. The performance of it (without a new Act of Parliament) would have been an indictable offence, and the Court could not presume that an Act would have been obtained. Lord Campbell said:—"In principle I do not see how the present case is to be distinguished from an action by A. against B. to recover 1,000*l.*, B. having covenanted with A. that within twelve calendar months he would murder C., and that on failing to do so he would forfeit and pay to A. 1,000*l.* as liquidated damages, the declaration alleging that although B. did not murder C. within the twelve calendar months he had not paid A. the 1,000*l.*"

It seems impossible to draw any conclusion in point of law from such a division of opinion⁹. But the case gives this practical warning, that whenever it is desired to contract for the doing of something which is not certainly lawful at the time, or the lawfulness of which depends on some event not within the control of the parties, the terms of the contract should make it clear that the thing is not to be done unless it becomes or is ascertained to be lawful.

Moreover a contract may be illegal because an offence is contemplated as its ulterior result, or because it invites to the commission of crime. [For example, if A. insures his life, and the policy provides for payment of the sum assured if A. commits suicide while sane, and if A. does commit suicide while sane, his personal representative cannot recover the sum, for the law

⁹ 4 E. & B. 441.

¹⁰ Not only was the Court equally divided, but a perusal of the judgments at large will show that no two members of it really looked at the case in the same way. The reporters (4 E. & B. 397) added not without reason to the headnote: *Et querit inde.* [See the remarks on this case made in *Eastern Counties Ry. v. Hawkes* (1855) 5 H. L. C. 331, 358, 371.]

will not assist him to recover the fruits of A.'s crime."¹¹] So too although there is nothing unlawful in printing, no right of action can arise for work done in printing a criminal libel¹² But this depends on the more general considerations which we reserve for the present

FRAUDULENT

Again an agreement will generally be illegal, though the matter of it may not be an indictable offence, and though the formation of it may not amount to the offence of conspiracy, if it contemplates¹³ any civil injury to third persons.¹⁴ Thus an agreement to divide the profits of a fraudulent scheme or to carry out some object in itself not unlawful by means of an apparent trespass, breach of contract or breach of trust is unlawful and void.¹⁵ A applies to his friend B to advance him the price of certain goods which he wants to buy of C. B. treats with C for the sale and pays a sum agreed upon between them as the price. It is secretly agreed between A and C, that A shall pay a further sum: this last agreement is void as a fraud upon B whose intention was to relieve A from paying any part of the price.¹⁶ Again A and B are interested in common with other persons in a transaction the nature of which requires good faith on all hands and a secret agreement is made between A and B to the prejudice of those others' interest. Such are in fact the cases of agreements in fraud

¹¹ [*Beresford v. Royal Insurance Co. Ltd* [1938] A.C. 580, 107 L.J.K.B. 464. The American authorities are considered by Prof. Goodhart in 32 L.Q.R. 575, 587. Can a *bona fide* assignee of the policy recover to the extent of his interest? Lord Atkin and Frankfurter were of opinion *obiter* that he could at 599, 601, and they referred to *Moore v. Woolsey* 1851, 4 L. & B. 231 as supporting their opinion. For Macmillan, however, reserved his view on this question at 605.]

¹² *Popple v. Stockdale* 1825, R. & M. 117, 2 C. & P. 198, 31 R.R. 66.

¹³ If A contracts with B to do something which in fact but not to B's knowledge would involve a breach of contract or trust, A cannot lawfully perform his promise but yet may well be liable in damages for the breach. *Mullard v. Littlewood* (1850) 5 Ex. 775, 20 L.J. Ex. 2, 82 R.R. 71. See further at end of this chapter.

¹⁴ Approved by Lord Dunedin, *Farmers' Mart v. Milne* [1915] A.C. 106, 113, 84 L.J.P.C. 33. The law of Scotland is similar. *ib.*

¹⁵ An agreement to commit a civil injury is a conspiracy in many, but it is still uncertain precisely in what cases. [In the law of tort, it is now clear that a combination which inflicts damage on another person may be a tortious conspiracy although, if the act causing the damage were inflicted by a single person, it would not be tortious; but this, of course, does not mean that any act done in combination which inflicts damage on another person is tortious. *Crofter Hand Woven Harris Tweed Co., Ltd v. Veitch* [1942] A.C. 435 (H.L.).] See article on Conspiracy in *Encyc. Laws of England*, 3rd ed. An agreement to commit a trespass likely to lead to a breach of the peace. *Reg. v. Rowlands* (1851) 17 Q.B. 671, 686, 21 L.J.M.C. 81, 85 R.R. 615—or to commit a civil wrong by fraud and false pretences, *Reg. v. Warburton* (1870) L.R. 1 C.C.R. 274, 40 L.J.M.C. 22, cp *Reg. v. Aspinall* (1876) 2 Q.B. Div. at 59, 46 L.J.M.C. 145 is a conspiracy. An agreement to commit a simple breach of contract is not a conspiracy. [Secur, where such an agreement is likely to cause great public mischief. *Vernus v. Clive (Lord)* (1760) 4 Burr. 2472.] See on the whole subject, *Mogul Steamship Co. v. McGregor, Gow & Co.* [1892] A.C. 25, 61 L.J.Q.B. 295, *Quinn v. Leathern* [1901] A.C. 395, 70 L.J.P.C. 76, *Veitch's Case (supra)*.] Before the C.L.P. Act a court of common law could not take notice of an agreement being in breach of trust so as to hold it illegal: *Warwick v. Richardson* (1848) 10 W. & M. 274; 62 R.R. 608; and agreements to indemnify trustees against formal breaches of trust are in practice constantly assumed to be valid in equity as well as law.

¹⁶ *Jackson v. Ducharme* (1790) 3 T.R. 551.

of creditors"; that is, where there is an arrangement between a debtor and the general body of the creditors, but in order to procure the consent of some particular creditor, or for some other reason, the debtor or any person on his behalf, or with his knowledge,¹⁷ secretly promises that creditor some advantage over the rest. All such secret agreements are void: securities given in pursuance of them may be set aside, and money paid under them ordered to be repaid.¹⁸ Moreover, the other creditors who know nothing of the fraud and enter into the arrangement on the assumption "that they are contracting on terms of equality as to each and all" are under such circumstances not bound by any release they give.¹⁹ And it will not do to say that the underhand bargain was in fact for the benefit of the creditors generally, as where the preferred creditor becomes surety for the payment of the composition, and the real consideration for this is the debtor's promise to pay his own debt in full; for the creditors ought to have the means of exercising their own judgment.²⁰ But where one creditor is induced to become surety for an instalment of the composition by an agreement of the principal debtor to indemnify him, and to pledge part of the assets for that purpose, this is valid: for a compounding debtor is master of the assets and may apply them as he will.²¹

The principle of these rules was thus explained by Erle J. in *Mallalieu v. Hodgson*:—²²

"Each creditor consents to lose part of his debt in consideration that the others do the same; and each creditor may be considered to stipulate with the others for a release from them to the defendants [the debtors] in consideration of the release by him. Where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void: not only can he take no advantage from it, but he is also to lose the benefit of the composition."²³ The requirement of good faith among the creditors, and the preventing of gain by agreements for preference, has [*sic*] been uniformly maintained by a series of cases from *Leicester v. Rose*²⁴ to *Howden v. Haigh*²⁵ and *Bradshaw v. Bradshaw*.²²³

From the last cited case²⁶ it seems probable, though it is not decided, that when a creditor is induced to join in a composition

¹⁷ Equality among the creditors is of the essence of the transaction. Any agreement to give a preference, made with the debtor's privity, strikes at the root of the deed. It is immaterial whether the arrangement is under a statute or not, and whether the preferential payment is to come out of the debtor's funds or not: *Ex parte Milner* (1885) 15 Q. B. Div. 605; 54 L. J. Q. B. 425. In *Farmers' Mart v. Milns* [1915] A. C. 106; 84 L. J. P. C. 33 (Sc.), there was a specially ingenious attempt to disguise a contrivance for preferring a particular creditor.

¹⁸ *McKruan v. Sanderson* (1873) L. R. 15 Eq. at 234, per Malins V.-C.; 42 L. J. Ch. 296

¹⁹ *Daughish v. Tennant* (1866) L. R. 2 Q. B. 49, 54; 36 L. J. Q. B. 10.

²⁰ *Wood v. Barker* (1865) L. R. 1 Eq. 139.

²¹ *Ex parte Burrell* (1876) 1 Ch. Div. 537; 45 L. J. Bk. 68.

²² (1851) 16 Q. B. 689, 711—712; 20 L. J. Q. B. 339, 347; 83 R. R. 679. See further

Ex parte Oliver (1849-51) 4 De G. & Sm. 354.

²³ (1840) 11 A. & E. 1033; 52 R. R. 579.

²⁴ (1803) 4 East, 372: showing that the advantage given to the preferred creditor need not be in money.

²⁵ (1841) 9 M. & W. 29.

²⁶ *Higgins v. Pitt* (1849) 4 Ex. 312; 18 L. J. Ex. 488; 80 R. R. 566.

by having an additional payment from a stranger without the knowledge of either the other creditors or the debtor, the debtor on discovering this may refuse to pay him more than with such extra payment will make up his proper share under the composition, or may even recover back the excess if he has paid it involuntarily, *e.g.* to *bona fide* holders of bills given to the creditor under the composition.

A debtor who has given a fraudulent preference can claim no benefit under the composition even as against the creditor to whom the preference has been given.²⁶

A secret agreement by a creditor to withdraw his opposition to a bankrupt's discharge or to a composition is equally void, and it does not matter whether it is made with the debtor himself or with a stranger,²⁷ nor whether the consideration offered to the creditor for such withdrawal is to come out of the debtor's assets or not²⁸ and this even if it is part of the agreement that the creditor shall not prove against the estate at all.²⁹ In like manner if a debtor executes an assignment of his estate and effects for the benefit of all his creditors upon a secret agreement with the trustees that part of the assets is to be returned to him, this agreement is void.³⁰

We have here at an early stage of the subject a good instance of the necessarily approximate character of our classification. We have placed these agreements in fraud of creditors here as being in effect agreements to commit civil injuries. But a composition with creditors is in most cases something more than an ordinary civil contract, it is in truth a quasi-judicial proceeding, and as such is to a certain extent assisted by the law.³¹ Public policy, therefore, as well as private right, requires that such a proceeding should be conducted with good faith and that no transaction which interferes with equal justice being done therein should be allowed to stand. The doctrine of fraud on third parties, as it may be called, is however not to be extended to cases of mere suspicion or conjecture. A possibility that the performance of a contract may injure third persons is no ground for presuming that such was the intention, and on the strength of that presumed intention holding it invalid between the parties themselves.

"Where an instrument between two parties has been entered into for a purpose which may be considered fraudulent as against some third person, it may yet be binding, according to the true construction of its language, as between themselves."

Nor can a supposed fraudulent intention as to third persons (inferred from the general character and circumstances of a transaction) be allowed to determine what the true construction is.³²

²⁶ See page 259.

²⁷ *Hall v. Dyson* (1852) 17 Q. B. 785; 21 L. J. Q. B. 224; 85 R. R. 682.

²⁸ *McKie v. Sanderson* (1875) L. R. 20 Eq. 65; 42 L. J. Ch. 296.

²⁹ *v. Dobie* (1876) 1 C. P. D. 265; 45 L. J. C. P. 498.

³⁰ Bankruptcy Act, 1914, s. 16, 17 (from the superseded Act of 1883).

³¹ *Shaw v. Jeffery* (1860) 13 Moo. P. C. 432, 435.

FRAUD ON THIRD PERSONS

There are certain cases analogous enough to the foregoing to call for mention here, though not for any full treatment. Their general type is this: There is a contract giving rise to a continuing relation to which certain duties are incident by law; and a special sanction is provided for those duties by holding that transactions inconsistent with them avoid the original contract, or are themselves voidable at the option of the party whose rights are infringed. We have results of this kind from

- (a) Dealings between a principal debtor and creditor to the prejudice of a surety:
- (b) Dealings by an agent in the business of the agency on his own account:
- (c) Voluntary settlements before marriage "in fraud of marital rights."

In the first case the improper transaction is as a rule valid in itself, but avoids the contract of suretyship. In the second it is voidable as between the principal and the agent. In the third it is (or was) voidable at the suit of the husband.

(a) *Suretyship*.—"Any variance, made without the surety's consent in the terms of the contract between the principal [debtor] and the creditor, discharges the surety as to transactions subsequent to the variance,"³² unless it is evident to the Court "that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety."³³ The surety is not the less discharged "even though the original agreement may notwithstanding such variance be substantially performed."³⁴ An important application of this rule is that where there is a bond of suretyship for an officer, and by the act of the parties or by Act of Parliament the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided.³⁵ But when the guaranty is for the performance of several and distinct duties, and there is a change in one of them or if an addition is made to the duties of the principal debtor by a distinct contract, the surety remains liable as to those which are unaltered.³⁶ The following rules rest on the same ground:

"The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released,

³² Indian Contract Act, s. 133.

³³ *Holme v. Brunskill* (1877) 3 Q. B. Div. 495 (dis. Brett L. J.), overruling on this point *Sanderson v. Aston* (1873) L. R. 8 Ex. 73; 42 L. J. Ex. 64.

³⁴ Per Lord Cottenham, *Bonar v. Macdonald* (1850) 3 H. L. C. 226, 239; 88 R. R. 68.

³⁵ *Oswald v. Mayor of Berwick-on-Tweed* (1856) 5 H. L. C. 856; 25 L. J. Q. B. 383; *Pybus v. Gibb* (1846) 6 E. & B. 902, 911; 26 L. J. Q. B. 41; *Mayor of Cambridge v. Dennis* (1858) E. B. & E. 660; 27 L. J. Q. B. 474.

³⁶ *Harrison v. Seymour* (1866) L. R. 1 C. P. 518; 35 L. J. C. P. 264; *Skillett v. Fletcher* (1866) L. R. 1 C. P. 217, 224, in Ex. Ch. 2 C. P. 469; 36 L. J. C. P. 206.

or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.”

“A contract between the creditor and the principal debtor by which the creditor makes a composition with, or promises to give time to or not to sue the principal debtor discharges the surety unless the surety assents to such contract,” or unless in such contract the creditor reserves his rights against the surety “in which case the surety’s right to be indemnified by the principal debtor continues.” One reported case constitutes an apparent exception to the general rule but is really none as there the normal giving of time had in substance the effect of accelerating the creditor’s remedy.¹ The rule applies as against a creditor of two principal debtors of whom one has become primarily liable as between themselves whether the creditor assents to the arrangement or not provided he has notice of it.²

If the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do and the eventual remedy of the surety himself against the principal debtor is thereby impaired the surety is discharged.³

A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into whether the surety knows of the existence of such security or not and if the creditor loses or without the consent of the surety parts with such security the surety is discharged to the extent of the value of the security.⁴

¹ I C A s 134 *Kearley v Cole* 1846 16 M & W 128 161 J Ex 11 13 R R 470, *Cragoe v Jones* 1871 J R 8 Ex 81 42 L J Ex 681 The discharge extends to any security given by the surety *Bolton v Salmon* [1891] 1 Ch 48 66 L J Ch 230

² I C A s 135, *Oakley v Pasheller* 1876 4 Cl & F 207 10 Bl N S 448 42 R R 1 *Oriental Finance Corporation v Overend Gurney & Co* 1874 1 R 7 H L 148 *Green v Wynn* 1880 1 R 4 Ch 204 38 L J Ch 220 *Bateson v Gellie* 1877 L R 7 C P 61 41 L J C P 31 It must be a binding contract with the principal debtor *Clarke v Butler* 1880 41 Ch D 422 434 58 L J Ch 160

³ Whether the surety knows of it or not *Webb v Hewitt* 1857 3 K & J 411 442 112 R R 224, 227 and see per Lord Hatherley *L R* 1 Ch 130

⁴ *Close v Close* 1853 4 D M G 176, 815

⁵ *Hulme v Cotes* 1827 2 Sim 12 29 R R 72

⁶ *Oakley v Pasheller* note ²) as discussed and explained in *Rouse v Bradford & Bk* C [1894] 2 Ch 32, 63 L J Ch 337, C A, affirmed [1894] 1 C 586 63 L J Ch 660

⁷ I C A s 139 (Story, Fq Jur § 325 nearly, *Watson v Alcock* [1853] 4 D M G 242, 102 R R 109 *Burgess v Eve* 1872 1 R 13 L J 490 51 L J Ch 517 *Phillips v Foxall* 1872 L R 7 Q B 666 41 L J Q B 293 *Sunder v Lister* (1873) L R 8 Ex 79, 42 L J Ex 64

⁸ I C A s 141 *Mayhew v Grckett* (1818) 2 Swanst 185 191, 19 R R 57 61 *Widd v Jay* (1872) L R 7 Q B 756, 762, 41 L J Q B 322, *Becherov v Levy* (1872) 1 R 7 C P 372 41 L J C P 161 securities now subsist notwithstanding payment of the debt for the benefit of a surety who has paid Merc Law Amendment Act, 1896 19 & 20 Vict c 97, s 5 A right to distrain for rent is not a security or remedy within this enactment *Russell v Shoobrad* (1885) 29 Ch Div 254 53 L T 365 During the currency of a bill of exchange an indorser is not a surety for the acceptor But after notice of dishonour he is entitled in like manner as if he were a surety to the benefit of all payments made and securities given by the acceptor to the holder *Duncan, Fox & Co v North & South Wales Bank* (1880) 6 App. Ca 1, reversing s c in C. A. 11 Ch. Div. 88, 50 L J Ch 355

Not only an absolute parting with the security, but any dealing with it, such that the surety cannot have the benefit of it in the same condition in which it existed in the creditor's hands, will have this effect.⁴² For the same reason, if there be joint securities, and the debtor releases one, it is a release to all; otherwise if the sureties are several.⁴³

Re-insurance—An analogous rule is applicable to contracts of re-insurance. The head policy cannot be materially altered without the consent of the re-insurers.⁴⁴

(b) *Agency*—"If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transactions."⁴⁵

"If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction."⁴⁶

These rules are well known and established and have been over and over again asserted in the most general terms. The commonest case is that of an agent for sale himself becoming the purchaser, or conversely: "He who undertakes to act for another in any matter shall not in the same matter act for himself. Therefore a trustee for sale shall not gain any advantage by being himself the person to buy." "An agent to sell shall not convert himself into a purchaser unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed."⁴⁷ "It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper."⁴⁸ Similarly an agent for sale or purchase must not act for the other party at the same time or take a secret commission from him.⁴⁹ If the local usage of a particular trade or market contravenes this axiom by "converting a broker employed

⁴² *Pledge v. Buss* (1860) 10 Johns. 603; 123 R. R. 281.

⁴³ *Ward v. Bank of New Zealand* (1883) (J. C.) 8 App. Ca. 735; 52 L. J. P. C. 65.

⁴⁴ *Norwich Union Fire Insce. Soc. v. Colonial Mutual Fire Insce. Co.* [1922] 2 K. B. 461, 469.

⁴⁵ I. C. A. s. 215. The Indian Act goes on to add, "if the case show either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent had been disadvantageous to him," but these qualifications are not recognised in English law. See *Storv on Agency* § 210; *Ex parte Lacey* (1802) 6 Ves. 625; 6 R. R. 9.

⁴⁶ I. C. A. s. 216.

⁴⁷ *Whitchote v. Lawrence* (1798) 3 Ves. 740; *Lowther v. Lowther* (1806) 13 Ves. 95, 103; and see *Charter v. Trevelyan* (1884) 11 Cl. & F. 714, 732; 65 R. R. 305.

⁴⁸ Per Willes J. in *Mollett v. Robinson* (1870) L. R. 5 C. P. at 635; 39 L. J. C. P. 290. Cp. *Gunst v. Smythe* (1870) L. R. 5 Ch. 551, per Giffard L. J. 39 L. J. Ch. 536; *Sharman v. Brandt* (1871) L. R. 6 Q. B. 720; 40 L. J. Q. B. 312.

⁴⁹ A modern case, which, if anything, increases the wholesome strictness of the law, is *Grant v. Gold Exploration, &c. Syndicate of British Columbia* [1900] 1 Q. B. 233; 69 L. J. Q. B. 150, C. A.

to buy into a principal selling for himself," it cannot be treated as a custom so as to bind a principal dealing in that trade or market through a broker, but himself ignorant of the usage."

The rule is not arbitrary or technical, but rests on the principle that an agent cannot be allowed to put himself in a position in which his interest and his duty are in conflict, and the Court will not consider whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent, for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an enquiry as that. It is a corollary from the main rule that so long as a contract for sale made by an agent remains executory he cannot re-purchase the property from his own purchaser except for the benefit of his principal. A like rule applies to the case of an executor purchasing any part of the assets for himself. But it is put in this somewhat more stringent form that the burden of proof is on the executor to show that the transaction is a fair one. This brings it very near to the doctrine of Undue Influence of which in a later chapter. It makes no difference that the legatee from whom the purchase was made was also co-executor. Another branch of the same principle is to be found in the rules against trustees and limited owners renewing leases or purchasing reversions for themselves.

Again. It may be laid down as a general principle that in all cases where a person is either actually or constructively an agent for other persons all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employers. If a person makes any profit by being employed contrary to his trust, the employer has a right to call back that profit. And it is not enough for an agent who is himself interested in the matter of the agency to tell his principal that he has some interest: he must give full information of all material facts."

* *Robinson v. Mollett* 1874-5 1 L. R. 7 H. L. 802 34 L. 44 I. J. C. P. 362 and further as to alleged customs of this kind *De Bussche v. Alt* 1877 3 Ch. Div. 286 47 L. J. Ch. 386. For the special application of the rule to the duty of directors of companies *Hay's case* (1875) 1 L. R. 10 Ch. 503 44 I. J. Ch. 721. *Albion Steel Works Co. v. Martin* (1875) 1 Ch. D. at 585, per Jessel M. R. 45 I. J. Ch. 173, as to promoters *Neu-Somboritz Phosphates Co. v. Erlanger* 1877 5 Ch. Div. 71, 46 L. J. Ch. 325.

²² *Parker v. McKenna* (1874) 1 L. R. 10 Ch. 96 118, 124 215 44 I. J. Ch. 325.

²³ *Gray v. Warner* (1879) 1 L. R. 16 Eq. 577, 42 L. J. Ch. 556.

²⁴ Notes to *Keech v. Sandford* 1726 in Wh. & T. L. C. The last case on the subject is *Trumpet v. Trumpet* (1879) 1 L. R. 14 Eq. 205, 8 Ch. 870; 42 L. J. Ch. 641. On the general rule, see also *Marsh v. Whitmore* (1874) (Sup. Court, U.S.) 21 Wall. 178.

²⁵ Story on Agency, § 211, adopted by the Court in *Morrison v. Thompson* (1874) 1 L. R. 10 Q. B. 480 485, 43 L. J. Q. B. 215, where several cases are collected.

²⁶ *Massey v. Davies* (1794) 2 Ves. 317 320, 2 R. R. 218.

²⁷ See authorities collected, and observations of the Court thereon, *Dunne v. English* (1874) 1 L. R. 18 Eq. 524, 534. [See also *Regier v. Campbell-Stewart* (1939) Ch. 766 108 L. J. Ch. 321.] The developments of the principle in modern company law cannot be followed here. For an exposition of its limits, see *Castle Roca R. Co. v. Forwood* [1901] 1 Ch. 746; 70 L. J. Ch. 385, C. A., [*Regal (Hastings), Ltd. v. Gulliver* (1942) 1 All E. R. 378, H. L.]

Even this is not all: an agent, or at any rate a professional adviser, cannot keep any benefit which may happen to result to him from his own ignorance or negligence in executing his duty. In such a case he is considered a trustee for the persons who would be entitled to the benefit if he had done his duty properly."

In this class of cases the rule seems to be that the transaction improperly entered into by the agent is voidable so far as the nature of the case admits. Where it cannot be avoided as against third parties, the principal can recover the profit from the agent. But where there are a principal, an agent, and a third party contracting with the principal and cognizant of the agent's employment, and there are dealings between the third party and the agent which give the agent an interest against his duty, there the principal on discovering this has the option of rescinding the contract altogether, and may rely on this ground even after repudiation for some other and insufficient reason.⁶¹ Thus when company A. contracted to make a telegraph cable for company B. and a term of the contract was that the work should be approved by C., the engineer of company B., and C. took an undisclosed sub-contract from company A. for doing the same work; and further it appeared that this arrangement was contemplated when the contract was entered into: it was held that Company B. might rescind the contract.⁶²

(c) *Marital right*—The rule as to settlement "in fraud of marital right" was thus given by Lord Langdale:—

"If a woman entitled to property enters into a treaty for marriage, and during the treaty represents to her intended husband that she is so entitled, that upon the marriage he will become entitled *jure mariti*, and if, during the same treaty, she clandestinely conveys away the property, in such manner as to defeat his marital right, and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt but that a fraud is thus practised on the husband, and he is entitled to relief."⁶³

Moreover "If both the property and the mode of its conveyance, pending the marriage treaty, were concealed from the intended husband, as was the case of *Goddard v. Snow*,⁶⁴ there is still a fraud practised on the husband. The non-acquisition of property of which he had no notice is no disappointment, but still his legal right to property actually existing is defeated."⁶⁵

⁶⁰ *Bulkley v. Wilford* (1834) 2 Cl. & F. 102; 37 R. R. 39. Cp. *Corley v. Lord Stafford* (1857) 1 De G. & J. 238; 118 R. R. 104. As to alternative remedies, see *Grant's case*, p. 263, n. 52.

⁶¹ *Alexander v. Webber* [1922] 1 K. B. 642; 91 L. J. K. B. 320.

⁶² *Panama v. S. Pacific Telegraph Co. v. India Rubber, &c. Co.* (1875) L. R. 10 Ch 515; 45 L. J. Ch. 121.

⁶³ Cp. on this subject Dav. Conv. vol. 3, pt. 2, 707.

⁶⁴ *England v. Downs* (1840) 2 Beav. 522, 528; 50 R. R. 268, 272, 273.

⁶⁵ (1826) 1 Russ. 485; 25 R. R. 111. See the earlier authorities there discussed.

⁶⁶ *England v. Downs*, 2 Beav. 529; 50 R. R. 273. Cp. *Downes v. Jennings* (1863) 32 Beav. 290, 294. See further *St. George v. Wake* (1831-3) 1 My. & K. 610, 625, 36 R. R. 389; *Wrigley v. Summison* (1849) 3 De G. & Sm. 458; 84 R. R. 370; *Prideaux v. Lansdale* (1863) 4 Giff. 159; on appeal, 1 D. J. S. 433, 438, no decision on this part of the case; *Taylor v. Pugh* (1842) 1 Hare, 608; 58 R. R. 214.

The Married Women's Property Act, 1882, made the subject obsolete in this country as regards all marriages contracted after its commencement, and there has been no reported decision for many years. It is now thought advisable to omit the details given in former editions.

PROHIBITED DEGREES

Marriages within the prohibited degrees of kindred and affinity are another class of transactions contrary to positive law. For although no direct temporal penalties are attached to them, they have been made the subject of express and definite statutory prohibition.¹⁰ They formerly could not be treated as void unless declared so by an ecclesiastical Court in the lifetime of the parties, but by the Marriage Act, 1835 (5 & 6 Wm. 4 c. 55) they are now absolutely void for all purposes. An executory contract to marry within the prohibited degrees is of course absolutely void also,¹¹ and would indeed have been so before the statute. These rules are not local like other rules of municipal law prescribing the solemnities of the marriage ceremony, requiring the consent of particular persons or the like: the legislature has referred the prohibition to public grounds of a general nature (speaking of these marriages as "contrary to God's law") and it concerns not the form but the substance of the contract; it therefore applies to the marriages of domiciled British subjects in whatever part of the world the ceremony be performed, and whether the particular marriage is or is not of the kind allowed by the local law.¹² A

¹⁰ 32 H. 8 c. 38 marriage, and earlier repealed statutes of the same reign. It is a better supported opinion that 5 & 6 Wm. 4 c. 55 does not contain any new and substantive prohibition. See *Brook v. Brook* 1861 9 H. L. C. 193, 131 R. R. 123.

¹¹ It seems from *Millard v. Littlewood* 1890 5 Ex. 77, 20 L. J. 282, 82 R. R. 871 that in the barely possible case of the relationship being known to only one of the parties, by whom it is fraudulently concealed from the other, the innocent party may sue as for a breach of contract, though the performance of the agreement would be unlawful. Here the ground of liability is either estoppel or it implies warranty of ability to perform the promise lawfully. [In *Super v. Allison* [1937] 2 K. B. 403, 104 L. J. K. B. 597 Greaves Lord J. expressed an opinion that the innocent party could not maintain an action, but this was admittedly an *obiter dictum* nor was *Millard v. Littlewood* cited.]

¹² The use of these particular words seems of little importance. It would certainly appear bold to apply them to marriages which are permissible by dispensation in the Canon law, and allowed unconditionally by the German Civil Code (no mention those which have been made lawful here in the course of the twentieth century). The true reason is shortly put by Savigny Syst. 8 § 26 "die hier einschlagenden Gesetze, die auf sittlichen Rückichten beruhen, haben eine streng positive Natur." Savigny's authority is perhaps sufficient to defend the doctrine of *Brook v. Brook* against the raucous criticism passed upon it by the Chief Justice of Massachusetts in *Commonwealth v. Lane* 1873 113 Mass. at 473.

"The judgment proceeds upon the ground that an Act of Parliament is not merely an ordinance of man but a conclusive declaration of the law of God, and the result is that the law of God, as declared by Act of Parliament, and expounded by the House of Lords, varies according to the time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure.

¹³ *Brook v. Brook* 1861 9 H. L. C. 193. See per Lord Campbell at 220. He also doubted whether a marriage allowed by the law of the place, but contracted by English subject who had come there on purpose to evade the English law, would be recognized even by the local courts. [See comment on this case in Cheshire Private International Law (2nd ed. 1938), 224-225.] (cp. *Sottomayor v. De Barros*, note ¹⁴).

promise by a married man whose wife is living to marry another woman after his wife's death is void as being against public policy if the fact is known to the promisee.⁷¹ [But where there has been a decree nisi for the dissolution of a marriage, although the marriage is in being till the decree is made absolute, a promise made by either spouse before that event occurs to marry a third person is not void as against public policy, and breach of that promise entitles the third person to bring an action for damages. Such was the decision of a bare majority of the House of Lords in *Fender v. St. John-Mildmay*.⁷² When the decree nisi has been pronounced, nothing but the shell of the marriage is left. Its normal obligations and conditions have disappeared. The parties are living apart, and they owe no duties to each other to perform any kind of matrimonial obligation. The custody of the children has been provided for by the Court, and so has the maintenance of the wife, if she is the petitioner. It is "merely fanciful to suggest that the public interests are in any respect being impaired" by the promise to marry the third person.]

Where a marriage has been contracted in England between foreigners domiciled abroad, English Courts will recognize disabilities, though not being *nursi gentium*, imposed by the law of the domicile of both parties⁷³ but a marriage celebrated in England is not held invalid by English Courts on the ground that one of the parties is subject by the law of his or her domicile to a prohibition not recognized by English law, at all events where the other party's domicile is English.⁷⁴

STATUTORY RESTRAINT

Moreover a great variety of dealings of which contracts form part, or to which they are incident in the ordinary course of affairs, are for extremely various reasons forbidden or restricted by statute. In the eighteenth century, in particular, Acts of Parliament regulating the conduct of sundry trades and occupations were strangely multiplied. Most of these are now repealed, but the decisions upon them established principles on which our Courts still act in dealing with statutes of this kind.

⁷¹ *Wilson v. Caruley* [1908] 1 K. B. 720; 77 L. J. K. B. 594, C. A. According to earlier authorities which is quite consistent with this a promisee who believed the promisor to be unmarried has a right of action: *Milward v. Littlewood*, note ⁶⁸.

⁷² [1938] A. C. 1; 106 L. J. K. B. 641.]

⁷³ [Lord Atkin, [1938] A. C. 16-17, see, too, Lord Wright at 49. *Wilson v. Caruley* note ⁷¹ came in for a good deal of discussion.]

⁷⁴ *Sottomayor v. Barros* (1877) 3 P. Div. 1, 47 L. J. P. 23. [Cp. Cheshire, *Private International Law*, 2nd ed., 225, 229.]

⁷⁵ *Sottomayor v. Dr Barros* 1879, 3 P. D. 94, dissenting from some *dicta* in the previous judgment of the C. A., which however went on a supposed different state of the facts. See further, on this perplexed topic, Sir Howard Elphinstone's "Notes on the English Law of Marriage," in L. Q. R. v. 44, the chapter on Marriage in Dicey, "Conflict of Laws"; *Chett v. Chett* [1909] P. 67; 78 L. J. P. 23, and Mr. Dicey thereon in L. Q. R. xxv, 202. As to the peculiar personal disabilities imposed by the Royal Marriage Act, see the *Success Peerage Case* (1844) 11 Cl. & F. 85; 65 R. R. 11.

The question whether a particular transaction comes within the meaning of a prohibitory statute is manifestly one of construction. So far as we have to do with it here, we have in each case to ask: Does the Act mean to forbid this agreement or not? And in each case the language of the particular Act must be considered on its own footing. Decisions on the same Act may afford direct authority. But decisions on more or less similar enactments, and even on previous enactments on the same subject, cannot as a rule be regarded as giving more than analogies. Attempts have indeed been made at different times to lay down fixed rules, nominally of construction, but really amounting to rules of law which would control rather than ascertain the expressed intention of the legislature. But in recent times our Courts have fully and explicitly disclaimed any such powers of interpretation.

"The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act," provided that the words be sufficient to accomplish the manifest purpose of the Act."

The effect of plain and unambiguous words is not to be limited by judicial construction, even though anomalous results should follow."

On the other hand the general intention is to be regarded, and may if necessary prevail over particular expressions, no less than in the interpretation of private instruments. But it must also be an intention collected from what the legislature has said, not arrived at by conjectures of what the legislature might or ought to have meant. A transaction not in itself immoral is not to be held unlawful on a conjectural view of the policy of a statute. "The true policy of a statute is for a court of justice neither more nor less than its true construction. The Courts no longer undertake either to cut short or to widen the effect of legislation according to their views of what ought to be the law." "Before we can make out that a contract is illegal under a statute, we must make out distinctly that the statute has provided that it shall be so."

These principles, when applied to the more limited subject-matter of prohibitory statutes, give the following corollaries.

(a) When a transaction is forbidden, the grounds of the prohibition are immaterial. Courts of Justice cannot take note of any

¹¹ *Opinion of the Judges in the Sussex Peerage Case* 11 Cl. & F. at 143, 65 R. R. 51, per Tindal C. J., per Lord Brougham at 150; 65 R. R. 55. And see per Knight Bruce L. J. *Croft v. Middleton* (1856) 8 D. M. G. at 217, 110 R. R. 186, per Lord Blackburn, in *River Wear Consols v. Adamson* (1877) 2 App. Ca. at 756; 4 L. J. Q. B. 193.

¹² *Cargo ex Argos, &c.* (1872-3) L. R. 5 P. C. at 152-3. The doctrine formerly current (in accordance with the prevailing speculative opinion on the Continent), that statutes might be disregarded if the Courts thought them contrary to reason, common right, or natural equity (all synonymous terms for this purpose), has long been repudiated: see per Willes J. *Lee v. Bude, &c. Ry. Co.* (1871) L. R. 6 C. P. 576, 582; 40 L. J. C. P. 285; cp. *Journ. Soc. Comp. Leg.* for 1900, at 423.

¹³ *Op.* pp. 201-202.

¹⁴ *Barton v. Mann* (1875) L. R. 6 P. C. 134; 44 L. J. P. C. 19.

¹⁵ *Field v. 4 Q. B. D.* at 224.

difference between *mala prohibita* (i.e. things which if not forbidden by positive law would not be immoral) and *mala in se* (i.e. things which are so forbidden as being immoral).

(b) The imposition of a penalty by the legislature on any specific act or omission is *prima facie* equivalent to an express prohibition.

These rules are established by the case of *Bensley v. Bignold*,¹¹ which decided that a printer could not recover for his work or materials when he had omitted to print his name on the work printed, as then required by statute.¹² It was argued that his right under the contract was untouched by the Act, which contained no specific prohibition, but only a direction sanctioned by a penalty. But the Court held unanimously that this was untenable, and a party could not be permitted to sue on a contract where the whole subject-matter was in direct violation of the provisions of an Act of Parliament. And Best J said that the distinction between *mala prohibita* and *mala in se* was long since exploded. The same doctrine has repeatedly been enounced in later cases.

Thus, for example, by the Court of Exchequer.

"Where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute though the statute inflicts a penalty only, because such a penalty implies a prohibition."¹²

It is needless to discuss the policy of the law when it is distinctly enunciated by a statutory prohibition.

(c) Conversely the absence of a penalty, or the failure of a penal clause in the particular instance will not prevent the Court from giving effect to a substantive prohibition.

(d) What the law forbids to be done directly cannot be made lawful by being done indirectly.

In *Booth v. Bank of England* a joint stock bank procured its manager to accept certain bills on the understanding that the bank would find funds, these bills being such as the bank itself could not have accepted without violating the privileges of the Bank of England. It was held by the House of Lords, following the opinion of the judges that this proceeding must equally be a violation of the rights and privileges of the Bank of England, upon the principle that whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contriv-

¹¹ (1882) 5 B & Ald 355, 24 R. R. 401. Presumably the defendant could have sued on the contract if he was not a party to the transgression.

¹² See now 32 & 33 Vict. c. 24.

¹³ *Cope v. Rowlands* (1836) 2 M & W 140, 157, 46 R. R. 532, 539. Cp. *Chambers v. Manchester and Milford Ry Co.* (1864) 5 B & S 588; 33 L. J. Q. B. 268, *Re Lark and Toughall Ry Co.* (1869) L. R. 4 Ch. 748, 758; 30 L. J. Ch. 277.

¹⁴ See per Lord Cranworth, *Ex parte Neilson* (1853) 3 D. M. G. 556, 566.

¹⁵ *Sussex Peerage case* (1844) 11 Cl & F. at 148-9, 65 R. R. 54, 55, [*Montreal Trust Co. v. Canadian National Ry.* (1939) A. C. 613; 109 L. J. P. C. 5.]

¹⁶ (1840) 7 Cl. & F. 509, 540; 51 R. R. 36, upholding *Bank of England v. Anderson* (1836) 2 Keen, 398; 3 Bing. N. C. 589, 44 R. R. 271.

ance: " for the acceptor was merely nominal, and the bills were in fact meant to circulate on the credit of the bank.

In *Bank of United States v. Owens*⁸⁶ (Supreme Court, U.S.) the charter of the bank forbade the taking of a greater rate of interest than six per cent., but did not say that a contract should be void in which such interest was taken. A note payable in gold was discounted by a branch of the bank in a depreciated local paper currency at its nominal value, so that the real discount was much more than six per cent. The Court held this transaction void, though there was no express prohibition of an *agreement* to take higher interest, and though the charter spoke only of *taking*, not of *reserving* interest. Parts of the judgment are as follows: " A fraud upon a statute is a violation of the statute." " It cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. In those instances in which Courts are called upon to inflict a penalty it is necessarily otherwise: for then the actual receipt is generally necessary to consummate the offence. But when the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule that it is unlawful to contract to do that which it is unlawful to do."

" There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal . . . there is no distinction as to vitiating the contract between *malum in se* and *malum prohibitum*."⁸⁷

The cases are similar in principle in which transactions have been held void as attempts to evade the bankruptcy law: thus, to take only one example, a stipulation that a security shall be increased in the event of the debtor's bankruptcy, or any provision designed for the like purpose and having the like effect, is void.⁸⁸

When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession—

(e) are void if it appears by the context that the object of the legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed:

(f) are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely

⁸⁶ (1829) 2 Peters, 327. [See, too, Williston, Contracts, §§ 1763—1770, on the topic of statutory prohibitions in general.]

⁸⁷ 2 Peters, 536, 539.

⁸⁸ *Ex parte Mackay* (1873) L. R. 8 Ch. 643; 42 L. J. Bk. 68; *Ex parte Williams* (1877) 7 Ch. Div. 138, where the device used was the attornment of the debtor to his mortgagee at an excessive rent: *Ex parte Jackson* (1880) 14 Ch. Div. 725. It must be shown, to vitiate a transaction on this ground, that the provision was inserted in contemplation of bankruptcy and for the purpose of defeating the bankruptcy law: *Ex parte Voisey* (1882) 21 Ch. Div. 442, 461; 52 L. J. Ch. 121.

administrative purposes, e.g., the convenient collection of the revenue.

The following are instances illustrating this distinction:—"

AGREEMENT VOID

Ruchie v. Smith (1848) 6 C. B. 462 18 L. J. C. P. 9. 77 R. R. 369. The owner of a licensed house underlet part of it to another person, in order that he might there deal in liquor on his own account under colour of his lessor's licence and without obtaining a separate licence. This agreement was void its purpose being to enable one of the parties to infringe an Act passed for the protection of public morals: (the licensing Acts are of this nature and not merely for the benefit of the revenue, for this reason that licences are not to be had as a matter of right by paying for them. For the same reason and also because there is a specific penalty for each offence against the licensing law, it seems that a sale of liquor in an unlicensed house is void *Hamilton v Grainger* (1859) 5 H. & N. 40)

Taylor v. Croxalland Gas Co (1854) 10 Ex. 293. 23 L. J. Ex. 254, 102 R. R. 586. A penalty being imposed by statute on unqualified persons acting as conveyancers, the Court held that the object was not merely the gain to the revenue from the duties on certificates, but the protection of the public from unqualified practitioners, an unqualified person was therefore not allowed to recover for work of this nature (p. *Leman v. Housley* (1874) L. R. 10 Q. B. 66 44 L. J. Q. B. 22).

In *Stevens v. Gough* (1859) 7 C. B. N. S. 99. 29 L. J. C. P. 1; 121 R. R. 397, a builder was not allowed to recover the price of putting up a wooden shed contrary to the regulations imposed by the Metropolitan Building Act 1855 18 & 19 Vict. c. 122. The only question in the case was whether the structure was a building within the Act. But note that here the prohibition was for a public purpose namely, to guard against the risk of fire.

Barton v. Piggott (1874) L. R. 11 Q. B. 86. By the Highway Act 1835 (5 & 6 Will. 4, c. 50), s. 46 a penalty is imposed on any surveyor of highways who shall have an interest in any contract, or sell materials, &c. for work on any highway under his care unless he first obtain a licence from two justices. The effect of this is that an unlicensed contract by a surveyor to perform work or supply materials for any highway under his care is absolutely illegal and there is no discretion to allow payments in respect of it.

CONTRACT NOT AVOIDED

Bailey v. Harris (1849) 12 Q. B. 905 18 L. J. Q. B. 115. A contract of sale is not void merely because the goods are liable to seizure and forfeiture to the Crown under the excise laws.

Smith v. Mauchood (1845) 14 M. & W. 452. 15 L. J. Ex. 149 69 R. R. 724. The sale of an exciseable article is not avoided by the seller having omitted to paint up his name on the licensed premises as required by the Excise Licences Act 1825 (6 Geo. 4, c. 81), s. 25.

" The statutes mentioned in these illustrations must not be assumed to be still in force.
 this not being material for our purpose
 " Now by the Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 41—48 [s. 44 was repealed and replaced by the Solicitors Act, 1892 22 & 23 Geo. 5, c. 37], s. 47].

Probably this decision would govern the construction of the similar current enactment in the Licensing (Consolidation) Act, 1910 (10 Ed. 7 and 1 Geo 5, c 24), s. 74.

Smith v Lido (1858) 4 C B N S 395, in Ex Ch 5 C B N S 587, 27 L. J C P 196, 335, 116 R R 780. One who acted as a broker in the City of London without being licensed under certain eighteenth century Acts could not recover any commission but a purchase of share made by him in the market was not void and if he had to pay the purchase-money by the usage of the market, he could recover from his principal the money so paid.

And in general an agreement which the law forbids to be made is void if made. But an agreement forbidden by statute may be saved from being void by the statute itself, and on the other hand an agreement made void and not enforceable by statute is not necessarily illegal. An agreement may be forbidden without being void, or void without being forbidden.

(g) Where a statute forbids an agreement but says that if made it shall not be void, then if made it is a contract which the Court must enforce.

By the Pluralities Act 1888 (51 & 52 Vict. c. 106) it is unlawful for a spiritual person to engage in trade and the ecclesiastical Court may inflict penalties for it. But by s. 31 a contract is not to be void by reason only of being entered into by a spiritual person contrary to the Act. It was contended without success in *Leach v Bright** that this proviso could not apply when the other party knew with whom he was dealing. But the Court held that the knowledge of the other party was immaterial: the legislature meant to provide against the scandal of such a defence being set up. And Erle J. said that one main purpose of the law was to make people perform their contracts and in this case it fortunately could be carried out.

(h) Where no penalty is imposed and the intention of the legislature appears to be simply that the agreement is not to be enforced, there neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose."

Modern legislation has produced some very curious results of this kind. In several cases the agreement cannot even be called void, being good and recognizable by the law for some purposes or for every purpose other than that of creating a right of action. These cases are reserved for a special chapter."

* 1855) 4 F & B 917, 25 L. J. Q. B. 191, 10 R R 823.

"Adopted by the Supreme Court, *U.S. Chapman v. County of Douglas* 1882) 10 U.S. 348, 356.

"See Ch. 13, On Agreements of Imperfect Obligation. The distinction between an enactment which imposes a penalty without making the transaction void, and one which makes the forbidden transaction void, is expressed in Roman law by the terms *minus quam perfecta lex* and *perfecta lex*. Ulp. Reg. 1, § 2, cp. Sav. Syst. 4, 550. A constitution of Theodosius and Valentinian (Cod. 1, 14, de leg. 5) enjoined that all prohibitory enactments were to be construed as avoiding the transactions prohibited by them (that is, as *leges perfectae*) whether it were so expressed or not.

WAGERS

In point of form there is nothing in the Common Law to make a bet or any other gambling agreement incapable of being an enforceable contract. It is a conditional agreement made by mutual promises, and the promises are good enough consideration for one another. The best definition of a wagering agreement is Sir William Anson's: "A promise to give money or money's worth upon the determination or ascertainment of an uncertain event" "that is, uncertain to both parties alike as not being within the knowledge or control of either. Commonly the uncertain event is in the future, such as the result of a race or sporting contest of any kind not yet decided but it need not be. The event may even be an ancient fact. In the eighteenth century when members of Parliament affected classical scholarship bets were made in the House of Commons on the correctness of Latin quotations. If our judges had taken a larger and more courageous view in the eighteenth century they would have held as matter of principle that the concern of the law is to protect and uphold men's honest dealings in matters of serious business and not to let the decision of such matters be delayed and hampered by the hearing of suits brought on merely sporting promises—not to mention the ill effects of excessive and systematic gambling on the general welfare of the realm. The Courts could not prevent men from gambling or from regarding payment of gaming debts as a debt of honour taking precedence of mere commercial liabilities but that was no reason for allowing such debts to be sued on. But the judges lacked courage to break the shackles of mere form and the resulting evils were twofold. By way of a partial remedy the Courts were astute to an extent bordering upon the ridiculous as Baron Parke said later¹ to find something contrary to public welfare or morality in the subject matter of a wager and for that reason disallow the action. These decisions had then put in forming the more general conception of public policy as setting limits to freedom of contract and in that connexion we shall return to them. But this method being clumsy and inadequate legislative interference became inevitable, and being exercised without any general plan it produced an irrational and intricate tangle of enactments both civil and criminal. The latter are wholly outside the scope of this book, and it would be out of proportion to its design which is to set forth the principles of the law if we pursued the former

¹ Anson, *Law of Contract* 17th ed. 221, 222. [In the 19th ed. 206, 207 there is substituted for this a quotation from Hawkins.] In *Carlill v. Carbolic Smoke Ball Co.* [1892] 2 Q. B. 481, 490, 491 which carries out in greater detail Anson's definition. The C. A. affirmed the decision [1893] 1 Q. B. 256 but the defence that the contract was a wager was scarcely regarded as a serious one and therefore the C. A. were not concerned to investigate it closely. The subject is fully discussed in Mr H. A. Street's exhaustive monograph on the Law of Gaming 1937¹, the author's own definition is on pp. 72, 73.]

² *Egerton v. Earl Brownlow* (1853) 4 H. L. C. 1124, 104 R. R. 1124.

into all their absurdities. The reader who desires full particulars will find them in Mr. Shoolbred's monograph* [and in Mr. Street's fuller treatise.†]

WAGERING AGREEMENTS

Agreements of this kind are null and void under the Gaming Act (8 & 9 Vict. c. 109) s. 18, and money won upon a wager cannot be recovered either from the loser or from a stakeholder (with a saving as to subscriptions or contributions for prizes or money to be awarded 'to the winner of any lawful game, sport, pastime, or exercise'—the saving extends only to cases where there is a real competition between two or more persons," and the "subscription or contribution" is not money deposited with a stakeholder by way of wager.)‡ Wagers were not as such unlawful or unenforceable at common law—and since the statute does not create any offence or impose any penalty a man may still without violating any law make a wager, and if he loses it pay the money or give a note for the amount. The consideration for a note so given does not become under this Act an illegal consideration—but merely no consideration at all. As to the effect of other legislation see the following paragraph. The difference is important to the subsequent holder of such a note. If the transaction between the original parties were fraudulent or in the proper sense illegal, the burden of proof would be on the holder to show that he was in fact a holder for value, but here the ordinary presumption in favour of the holder of a negotiable instrument is not excluded. At common law—if a party loses a wager and requests another to pay it for him, he is liable to the party so paying it for money

* C. J. Shoolbred, *The Law of Gaming and Betting*, 2nd ed. Lond. 1932. The information there given must now be supplemented by the Betting and Lotteries Act 1934, 24 & 25 Geo. 5, c. 58. The late McCarthy J. wrote in his foreword to this book: "I doubt if any branch of our law presents so curious a degree of complexity and confusion as that relating to gaming and betting. The statutes seem to be the result of uncertainty, of timidity, and of compromise. The obscurity of many of the decisions springs almost inevitably from the obscurity of the statutes on which they are given. At p. 3 the learned author is made, by a manifest slip of pen or press, to say that the Gaming Act, 1710, 9 Anne, c. 14, rendered all wagers 'it should be "securities for wagers" void'."

† *The Law of Gaming* (1937).]

‡ E.g. a wager that a horse will trot eighteen miles in an hour is not within it, as there can be no winner in the true sense of the clause. *Batson v. Newman* (1876) 1 C. P. Div. 57; Nor a so-called competition where the event is determined by chance or by a chance so arbitrary as to be equivalent to chance. *Barclay v. Pearson* (the "missing word" case) [1893] 2 Ch. 154, 62 L. J. Ch. 696.

§ *Diggle v. Higgs* 1877, 2 Ex. Div. 422, 46 L. J. Ex. 721, *Trimble v. Hull* (1870) 1 J. C. 5 App. Ca. 342, 40 L. J. P. C. 49, also there cannot be more than two parties to a bet. per Russell L. J. *Ellesmere (Earl) v. Wallace* [1929] 2 Ch. 1, 98 L. J. Ch. 177, C. A., a complicated case apparently settling little else outside its peculiar facts.

¶ As to British India, see *Queen-Empress v. Narottam Das Motram* (1889) 1 L. R. 19 Bom. 681, a curious case on the common Indian sport of "rain-gambling," which also shows the folly of supposing that gamblers will ever be at a loss for something to gamble on.

§ *Fitch v. Jones* (1855) 5 E. & B. 238; 24 L. J. Q. B. 293; 103 R. R. 455, see judgments of Lord Campbell C.J. and Erie J.

paid at his request";³ but the Gaming Act, 1892 (55 & 56 Vict. c. 9), makes all such payments irrecoverable,⁴ as also a loan of money to be used for a wager, and to be repaid only if the borrower wins.⁵

Attempts have been made to evade the operation of the principal Act in gambling transactions for "differences" in stocks by colourable provisions for the completion of purchase and delivery or receipt of the stocks. Whether the intention of the parties was really to buy and sell, or to wager on the price of the stocks, is a question of fact on which the verdict of a jury will not be disturbed if on the agreement as a whole there is evidence of a gambling intention.⁶ Nor will provisions of this kind validate an agreement which is otherwise a gambling agreement on the face of it.⁷

Similarly an agreement to refer disputes on bets to a named arbitrator is not enforceable; being merely accessory to the principal wagering agreement it is equally void.⁸

Under the Gaming Act, 1835 (5 & 6 Will. 4, c. 41), s. 1, securities for money won at gaming or betting on games, or lent for gaming or betting, are treated as given for an illegal consideration.⁹ Hence it has been said not to be a lawful occupation, though it is not

Roseuarne v. Billing [1863] 15 C. B. N. S. 316; 33 L. J. C. P. 55.

³ 55 Vict. c. 9; *Talam v. Reeve* [1893] 1 Q. B. 44; 62 L. J. Q. B. 30.

⁴ *Carney v. Plummer* [1897] 1 Q. B. 634; 66 L. J. Q. B. 415, C. A. It is doubtful whether the Act affects loans of money to be used in betting generally or for paying bets already lost; see p. 335.

⁵ *Universal Stock Exchange, Ltd. v. Strachan* [1896] A. C. 106; 65 L. J. Q. B. 429.

⁶ *Re Gieve* [1890] 1 Q. B. 794; 68 L. J. Q. B. 509, C. A.

⁷ *Joe Lee, Ltd. v. Lord Dalmeny* [1927] 1 Ch. 300; 96 L. J. Ch. 164.

⁸ This was a mitigation of the Gaming Act, 1710 (9 Anne, c. 19) which had made them wholly void. But the then existing statutory rights of losers to recover back winnings were in effect preserved by a cumbrously worded proviso (s. 2), which enabled a loser to recover from the winner, as if it had been paid to him direct, money received by him from a holder of a security (in the largest sense) created by the loser. Even bankers dealing with cheques as collecting agents were holders for this purpose: *Suttles v. Briggs* [1922] 1 A. C. 1; 91 L. J. K. B. 1. The result of that decision was that the wrong was repeated by the Gaming Act, 1922 (12 & 13 Geo. 5, c. 19), so that decisions upon it are obsolete. The Act is not retrospective: *Henshall v. Porter* [1923] 2 K. B. 193; 92 L. J. K. B. 866, which may still be useful as a warning against adventurous arguments on the general intention of statutes. [*Henshall v. Porter* was followed in *Brueton v. Woodward* [1941] 1 K. B. 680.]

The first section, still in force, does not affect a loan of money to pay a debt previously lost: *Ex parte Pyke* (1878) 8 Ch. Div. 754; 47 L. J. Bk. 100. [Further, it was held in *Hyams v. Stuart King* [1908] 2 K. B. 696; 77 L. J. K. B. 694, C. A., *dis.* Fletcher Moulton L.J. that forbearance by the winner of a bet to sue the loser on a security of this kind, coupled with forbearance to post the loser as a defaulter is good consideration for a new promise by the loser to pay. But the bare promise of forbearance to sue is no consideration for the new promise: *Poteliakhoff v. Teakla* [1938] 2 K. B. 816; 107 L. J. K. B. 679, C. A. Although bookmakers regard *Hyams' case* as affording them a method of recovery by action money won on a wager (see 25 L. Q. R. 76, 80), the Courts in later decisions have been quick to distinguish this case and to limit its application: see MacKinnon L.J. in *Poteliakhoff's case* [1938] 2 K. B. at 825, and Atkinson J. in *Norreys v. Zeffert* [1939] 2 All E. R. 187, 190. *Dicta* in this last case indicate that threats which go beyond an expression of an intention to post the loser of the bet as a defaulter may be unlawful and even criminal: cf. *Burden v. Harris* (1937) 54 T. L. R. 86. The C.A. has, however, accepted *Hyams' case* as law: *Latter v. Colwill* (1937) 53 T. L. R. 383.] In the United States it is generally held that wagering agreements are not only void but illegal: see *Irwin v. William* (1883) 110 U. S. 499, 510; *Harvey v. Merrill* (1889) 150 Mass. 1. As to recovering money deposited with a stakeholder or agent, see p. 344.

actually punishable, to make a business of betting or gaming, but the latest judicial opinion is otherwise.¹¹ The holder of a gaming security cannot waive it and sue for the consideration as on a simple contract.¹²

PAST COLLATERAL LEGISLATION RELATIVE TO WAGERS

Long before it was thought possible to interfere with gaming agreements as between the immediate parties Parliament endeavoured to discourage gambling, except for ready money and moderate stakes in divers indirect ways, including such odd ones as penalties on winning more than 10*l*. at a sitting. Mixed up with these provisions are prohibitions of unlawful games in general. The tale begins as early as the Restoration. Little or none of it is now of any practical importance, though the Gaming Act, 1710 (9 Anne, c. 19) remains not wholly repealed: it seems by oversight after being all but amended out of any substantial existence. But it is a tale of some permanent value as an example of blundering good intentions and a warning (if such people could take warning) to hasty piecemeal reformers. A readable and sufficient account including explanation of apparent anomalies so far as they are explicable may be found in the speeches of Lord Burkenhead and Lord Sumner in *Suttles v. Briggs*,¹³ a case whose direct authority was cut short by the Gaming Act of 1922 (12 & 13 Geo. 5, c. 19) as we have already mentioned.

Questions of conflict of laws arising out of gaming transactions are dealt with below under a more general head (pp. 350-352).

Lotteries were forbidden by penal statutes of various date from near the end of the seventeenth to near the middle of the nineteenth century. The latest governing legislation is contained in Part II of the Betting and Lotteries Act, 1934 which after declaring lotteries in general unlawful and defining incidental offences, proceeds to legalize (broadly speaking) lotteries being part of entertainments held for charitable purposes and private club and house lotteries.¹⁴

Some years earlier the Racecourse Betting Act, 1928 (18 & 19 Geo. 5, c. 31) legalized the use of totalisators under the regulation of a Control Board.¹⁵

The details are outside our scope.¹⁶

¹⁰ *O'Connor v. Ralston* [1920] 3 K. B. 351, 90 I. J. K. B. 261.

¹¹ *Jeffrey v. Bamford* [1921] 2 K. B. 351, 90 I. J. K. B. 664, *McCordie J.* [See p. 256, on *Humphrey v. Wilson* 1929 141 I. L. 460].

¹² *Carlton Hall Club Ltd. v. Lawrence* [1929] 2 K. B. 153, 98 I. J. K. B. 305.

¹³ See however, *Carlton Hall Club v. Lawrence*, last note.

¹⁴ [1922] 1 A. C. 1, 91 I. J. K. B. 1.

¹⁵ Lotteries Act, 1845, 8 & 9 Vict. c. 74, and several earlier Acts. Various innocent and not uncommon ways of raising money for charitable objects are probably within the letter of these Acts.

¹⁶ *Qn.* are the passengers, or any class of them, in a British ship within territorial waters a "society" within s. 24 (1) (a)? Probably the question is idle.

¹⁷ [Amended by the Betting and Lotteries Act, 1934 (24 & 25 Geo. 5, c. 58).]

¹⁸ See *A.-G. v. Racecourse Betting Control Board* [1935] 1 Ch. 34, 104 L. J. Ch. 15.

¹⁹ [They are considered fully in Street, *The Law of Gaming* 1937.]

DISTINCTION BETWEEN PUBLIC AND PRIVATE ACTS

It would be inappropriate to the general purpose of this work, as well as impracticable within its limits, to enter upon the contents or construction of the statutes which prohibit or affect various kinds of contracts by regulating particular professions and occupations or otherwise.

The rules and principles of law which disallow agreements whose object is to contravene or evade an Act of Parliament do not apply to private Acts, so far as these are in the nature of agreements between parties. If any of the persons interested make arrangements between themselves to waive or vary provisions in a private Act relating only to their own interests, it cannot be objected to such an agreement that it is in derogation of, or an attempt to repeal the Act.¹⁹

2—AGREEMENTS CONTRARY TO MORALS OR GOOD MANNERS

It is not every kind of immoral object or intention that will vitiate an agreement in a court of justice. When we call a thing immoral in a legal sense we mean not only that it is morally wrong, but that according to the common understanding of reasonable men it would be a scandal for a court of justice to treat it as lawful or indifferent, though it may not come within any positive prohibition or penalty. What sort of things fall within this description is in a general way obvious enough. And the law might well stand substantially as it is, according to modern decisions at any rate, upon this ground alone. Some complication has been introduced, however, by the influence of ecclesiastical law, which on certain points has been very marked, and which has certainly brought in a tendency to treat these cases in a peculiar manner, to mix up the principles of ordinary social morality with considerations of a different kind, and with the help of those considerations to push them sometimes to extreme conclusions. Having regard to the large powers formerly exercised by spiritual Courts in the control of opinions and conduct, and even now technically not abolished, it seems certain that everything which our civil Courts recognize as immoral is an offence against ecclesiastical law. Perhaps, indeed, the converse proposition is theoretically true, so far as the ecclesiastical law is not directly contrary to the common law.²⁰ But this last question may be left aside as merely curious.

As a matter of fact sexual immorality, which formerly was and in theory still is one of the chief subjects of ecclesiastical jurisdiction, is the only or almost the only kind of immorality of which the common law takes notice as such. Probably drunkenness would be on the same footing. It is conceived, for example, that a sale

¹⁹ *Savin v. Hoylake Ry. Co.* (1865) L. R. 1 Ex. 9; 35 L. J. Ex. 52. Cp. and dist. *Shaw's claim* (1875) L. R. 10 Ch. 177; 44 L. J. Ch. 670.

²⁰ Cp. Lord Westbury's remarks in *Hunt v. Hunt* (1861-2) 4 D. F. J. at 226-8, 233.

of intoxicating liquor to a man who then and there avowed his intention of making himself or others drunk with it would be void at common law. The actual cases of sale of goods and the like for immoral purposes, on whose analogy this hypothetical one is put, depend on the principles applicable to unlawful transactions in general, and are accordingly reserved for the last part of this chapter. Putting apart for the present these cases of indirect immoral agreements, as they may be called, we find that agreements are held directly immoral, in the limited sense above mentioned, on one of two grounds; as providing for or tending to illicit cohabitation, or as tending to disturb or prejudice the status of lawful marriage ("in derogation of the marriage contract," as it is sometimes expressed).

ILLICIT COHABITATION

With regard to the first class, the main principle is this. The promise or expectation of future illicit cohabitation is an unlawful consideration, and an agreement founded on it is void. Past cohabitation is not an unlawful consideration; indeed, there may in some circumstances be a moral obligation on the man to provide for the woman; but the general rule applies²¹ that a past executed consideration, whether such as to give rise to a moral duty or not, is equivalent in law to no consideration at all. An agreement made on no other consideration than past cohabitation is therefore in the same plight as any other merely voluntary agreement. If under seal it is binding and can be enforced,²² otherwise not.²³ The existence of an express agreement to discontinue the illicit cohabitation, which is idle both in fact (as an agreement which neither party could break alone) and in law—or the fact of the defendant having previously seduced the plaintiff, which "adds nothing but an executed consideration resting on moral grounds only,"—can make no difference in this respect.²⁴

The manner in which these principles are applied was thus stated by Lord Selborne:—

"Most of the older authorities on the subject of contracts founded on immoral consideration are collected in the note to *Benyon v. Nettlefold*.²⁵ Their results may be thus stated: 1. Bonds or covenants founded on past cohabitation, whether adulterous,²⁶ incestuous, or simply immoral, are valid in law, and not liable (unless there are other elements in the case) to be set aside in equity. 2. Such bonds or covenants, if given in

²¹ But the rule is modern (Ch. 4, pp. 139–141), and the earlier cases on this subject belong to a time when a different doctrine prevailed; they therefore discuss matters which in the modern view are simply irrelevant, e.g. the previous character of the parties. The phrase *praemium pudicitiae* comes from this period. *Praemium pudoris*, however, was used in a perfectly innocent sense in the old law of dowry: Co. Lit. 31a.

²² *Gray v. Mathias* (1800) 5 Ves. 286; 5 R. R. 48.

²³ *Beaumont v. Rowe* (1846) 8 Q. B. 483; 15 L. J. Q. B. 141; 70 R. R. 552.

²⁴ (1850) 3 Mac. & G. 94, 100; 87 R. R. 25.

²⁵ *Kaye v. Moors* (1822) 1 Sim. & St. 64.

consideration of future cohabitation, are void in law,²⁶ and therefore of course also void in equity. 3. Relief cannot be given against any such bonds or covenants in equity if the illegal consideration appears on the face of the instrument.²⁷ 4. If an illegal consideration does not appear on the face of the instrument, the objection of *particeps criminis* will not prevail against a bill of discovery in equity in aid of the defence to an action at law²⁸ [this is of no consequence in England since the Judicature Acts.] 5. Under some (but not under all) circumstances, when the consideration is unlawful, and does not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity.²⁹

The exception alluded to in the last sentence is probably this: that "where a party to the illegal or immoral purpose comes himself to be relieved from the obligation he has contracted in respect of it, he must state distinctly and exclusively such grounds of relief as the Court can legally attend to."³⁰ He must not put his case on the ground of an immoral consideration having in fact failed, or complain that the instrument does not correctly express the terms of an immoral agreement.³¹

Where a security is given on account of past cohabitation, and the illicit connection is afterwards resumed, or even is never broken off, the Court will not presume from that fact alone that the real consideration was future as well as past cohabitation, nor therefore treat the deed as invalid.³²

There existed a notion that in some cases the legal personal representative of a party to an immoral agreement might have it set aside, though no relief would have been given to the party himself in his lifetime: but this has been pronounced "erroneous and contrary to law."³³ An actual transfer of property, which is on the face of it "a completed voluntary gift, valid and irrevocable in law" and confers an absolute beneficial interest, cannot be afterwards impeached either by the settlor or by his representatives, though in fact made on an immoral consideration.³⁴ But it by no means follows that the Court will enforce the trusts. It may have to direct the trustees whom to pay, and will then disregard any disposition which is in fact founded on an immoral consideration.³⁵ Thus a settlement in the form of an ordinary marriage settlement in contemplation of a marriage (as formerly with a

²⁶ *Walker v. Perkins* (1764) 3 Burr. 1568.

²⁷ *Gray v. Mathias* (1800) 5 Ves. 286; 5 R. R. 48; *Smyth v. Griffin* (1842) 13 Sim. 245. 14 L. J. Ch. 28, appears to be really nothing else than an instance of the same rule. The rule is or was a general one: *Simpson v. Lord Howden* (1837) 3 My. & Cr. 97, 102; 45 R. R. 225, 226.

²⁸ *Benson v. Nettlefold* (1850) 3 Mac. & Gr. 94; 87 R. R. 25.

²⁹ *Ayerst v. Jenkins* (1873) L. R. 16 Eq. 275, 282; 42 L. J. Ch. 690.

³⁰ *Batty v. Chester* (1842) 5 Beav. 103, 109.

³¹ *Semble*, relief will not be given if it appears that the immoral consideration has been executed: *Susney v. Eley* (1849) 17 Sim. 1; 18 L. J. Ch. 350; 83 R. R. 276; but the case is hardly intelligible.

³² *Gray v. Mathias* (1800) 5 Ves. 286; 5 R. R. 48; *Hall v. Palmer* (1844) 3 Ha. 532. 64 R. R. 399; *Vallance v. Blagden* (1864) 26 Ch. D. 353.

³³ *Ayerst v. Jenkins* (1873) L. R. 16 Eq. 275, 281, 284; 42 L. J. Ch. 690.

³⁴ *Ayerst v. Jenkins*, last note.

³⁵ *Phillips v. Probyn* [1899] 1 Ch. 811, 681 J. Ch. 401.

deceased wife's sister) not allowed by English law is treated, as regards trusts for the so-called wife, as made on an immoral consideration, and the Court will pronounce such trusts invalid if applied to by the trustees for directions, though it would not set aside the settlement at the instance of the settlor.

Where parties who have been living together in illicit cohabitation separate and the man covenants to pay an annuity to the woman with a proviso that the annuity shall cease if the deed shall be void if the parties live together again, there the covenant is valid as a simple voluntary covenant to pay an annuity, but the proviso is wholly void. It makes no difference if the parties, being within the prohibited degrees of affinity, have gone through the form of marriage and the deed is in the ordinary form of a separation deed between husband and wife. When the parties are really married such a proviso is usual but superfluous for the deed is in any case avoided by the parties afterwards living together. This brings us to the second branch of this topic, namely the validity of separation deeds and agreements for separation.

AGREEMENTS FOR SEPARATION

The history of the subject will be found in Lord Westbury's judgment in *Hunt v. Hunt*. From the canonical point of view marriage was a sacrament creating an indissoluble relation. The duties attaching to that relation were of the highest possible religious obligation and paramount to the will of the parties. In ecclesiastical Courts an agreement or provision for a voluntary separation present or future was simply an agreement to commit a continuing breach of duties with which no secular authority could meddle and therefore was illegal and void.

For a long while all causes touching marriage even collaterally were claimed as within the exclusive jurisdiction of those Courts. The sweeping character and the gradual decay of such claims have already been illustrated by cases we have had occasion to cite from the Year Books in other places. In later times the ecclesiastical view of marriage was still upheld so far as the remaining ecclesiastical jurisdiction could uphold it," and continued to have much influence on the opinions of civil Courts, the amount of that influence is indeed somewhat understated in Lord Westbury's exposition. But the common law, when once its jurisdiction in such matters was settled, never adopted the ecclesiastical theory to the full extent. A contract providing for and fixing the terms of an immediate separation is treated like any other legal contract.

¹¹ See page 279.

¹² *Ex parte Yaden* (1874) 1 L. R. 9 Ch. 670, 43 L. J. Bk. 121.

¹³ *Westmeath v. Salisbury or Westmeath* (1820-1) 5 Bl. N. S. 339, 1 Dow. & Cl. 519, 35 R. R. 54.

¹⁴ (1861-2) 4 D. F. J. 221. The case was taken to the House of Lords, but the proceedings came to an end without any decision by the death of the husband: see per Lord Selborne, 8 App. Cas. at 421.

¹⁵ See 4 D. F. J. 235-8.

only the ordinary rule that the wife cannot contract with her husband without the intervention of a trustee is dispensed with in these cases.⁴¹ Being good and enforceable at law, the contract is also good and enforceable in equity, nor is there any reason for refusing to enforce it by any of the peculiar remedies of equity. In *Hunt v. Hunt* the husband was restrained from suing in the Divorce Court for restitution of conjugal rights in violation of his covenant in a separation deed.⁴² on the authority of the decision of the House of Lords⁴³ which had already established that the Court may order specific performance of an agreement to execute a separation deed containing such a covenant. The case may be taken as having put the law on a consistent and intelligible footing, though not without overruling a great number of pretty strong *dicta* of various judges in the Court of Chancery and even in the House of Lords;⁴⁴ and it has been repeatedly followed.⁴⁵ But an agreement by the wife not to oppose proceedings for a divorce pending at the suit of the husband is void, being not only in derogation of the marriage contract, but a collusive agreement to evade the due administration of justice.⁴⁶

We have seen that when it is sought to obtain the specific performance of a contract the question of consideration is always material, even if the instrument is under seal. Generally it is part of the arrangement in these cases that the trustees shall indemnify the husband against the wife's debts, and this is an ample consideration for a promise on the husband's part to make provision for the wife, and of course also for his undertaking to let her live apart from him, enjoy her property separately, &c.⁴⁷ But this particular consideration is by no means necessary. The trustee's undertaking to pay part of the costs of the agreement will do as well. But if the agreement is to execute a separation deed containing all usual and proper clauses, this includes, it seems, the usual covenant for indemnifying the husband, so that the usual consideration is in fact present.⁴⁸ In the earlier cases, no doubt, it was supposed that the contract was made valid in substance as well as in form only by the distinct covenants between the husband

⁴¹ P. 68; *McGregor v. McGregor* (1888) 21 Q. B. Div. 424; 57 L. J. Q. B. 268.

⁴² Note "a," p. 280. This covenant could not then be pleaded in the Divorce Court, which held itself bound by the former ecclesiastical practice to take no notice of separation deeds.

⁴³ *Wilson v. Wilson* (1848) 1 H. L. C. 538; 73 R. R. 158.

⁴⁴ In *St. John v. St. John* (1803-5) 11 Ves. 526, &c.; *Westmeath v. Westmeath* (1820-1) 1 Jac. 142 (Lord Eldon); *Worrall v. Jacob* (1816-7) 3 Mer. 268 (Sir W. Grant); *Warrender v. Warrender* (1835) 2 Cl. & F. 527 (Lord Brougham), 561-2 (Lord Lyndhurst). Most of these are to be found cited in the argument in *Wilson v. Wilson*. And even since that case *Vansittart v. Vansittart* (1858) 2 De G. & J. at 255 (Lord Chelmsford).

⁴⁵ *Bevant v. Wood* (1879) 12 Ch. D. at 623; *Sweet v. Sweet* [1895] 1 Q. B. 12; 64 L. J. Q. B. 108; *Marshall v. Marshall* (1879) 5 P. D. 19; 48 L. J. P. 49. A like covenant on the wife's behalf by a trustee is binding on her: *Clark v. Clark* (1885), 10 P. Div. 188.

⁴⁶ *Hope v. Hope* (1857) 8 D. M. G. 731, 745; 26 L. J. Ch. 417.

⁴⁷ See *Dav. Conv.* 5, pt. 2, 1079.

⁴⁸ *Gibbs v. Harding* (1870) L. R. 5 Ch. 336; 40 L. J. Ch. 374.

and the trustee as to indemnity and payment, or rather that these were the only valid parts of the contract. But since *Wilson v. Wilson*⁴⁰ and *Hunt v. Hunt* such a view is no longer tenable: in Lord Westbury's words "the theory of a deed of separation is that it is a contract between the husband and wife through the intervention of a third party, namely the trustees, and the husband's contract for the benefit of the wife is supported by the contract of the trustees on her behalf."⁴¹ A covenant not to sue for restitution of conjugal rights cannot be implied, and in the absence of such a covenant the institution of such a suit does not discharge the other party's obligations under the separation deed. Subsequent adultery does not of itself avoid a separation deed unless the other party's covenants are expressly qualified to that effect.⁴² A covenant by the husband to pay an annuity to trustees for the wife so long as they shall live apart – or, since the Married Women's Property Act, to the wife herself – remains in force notwithstanding a subsequent dissolution of the marriage on the ground of the wife's adultery, but it seems it would be void if future adultery were contemplated at the time.⁴³ The concealment of past misconduct between the marriage and the separation may render the arrangement voidable, and so may subsequently misconduct, if the circumstances show that the separation was fraudulently procured with the present intention of obtaining greater facilities for such misconduct.⁴⁴

A separation, or the terms of a separation between husband and wife cannot lawfully be the subject of an agreement for pecuniary consideration between the husband and a third person. But in the case of *Jones v. White*⁴⁵ it was decided by the Exchequer Chamber and the House of Lords that the husband's execution of a separation deed already drawn up is a good and lawful consideration for a promise by a third person.

A separation deed as we have above said, is avoided by subsequent reconciliation and cohabitation.⁴⁶ If it were not so, but could

⁴⁰ On the effect of that case – see the remarks in the House of Lords in a subsequent appeal as to the frame of the deed, *Wilson v. Wilson* (1834) 5 H. L. C. 101, 101 R. R. 25, and by Lord Westbury *Hunt v. Hunt* (1862), 4 D. L. J. 235.

⁴¹ *Hunt v. Hunt* (1862), 4 D. L. J. 240.

⁴² *Jee v. Threlkeld* (1824) 2 B. & C. 547, 20 R. R. 155.

⁴³ *16 Evans v. Carrington* (1890) 2 D. L. J. 301, 20 L. J. Ch. 110, 120 R. R. 158.

⁴⁴ *Charleworth v. Holt* (1873), 1 R. 9 Ex. 36, 33 L. J. Ex. 27, *Sweet v. Sweet* [1861] Q. B. 12, 14 L. J. Q. B. 106. The authority of *Charleworth v. Holt* has been doubted, but when directly challenged it was affirmed by the C. A., *May v. May* [1929] 2 K. B. 386, 98 L. J. K. B. 770, mainly on the ground that it had so long been relied on in practice. It is not thought useful here to refer specifically to the data there discussed.

⁴⁵ *Fearon v. Earl of Aylesford* (1884) 14 Q. B. Div. 792, 53 L. J. Q. B. 410.

⁴⁶ *Evans v. Carrington*, note ⁴³, and per Cotton L. J. 14 Q. B. D. at 795.

⁴⁷ (1842) 1 Bng. N. C. 656, in Ex. Ch. 5 Bng. N. C. 341, in H. L. 9 Cl. & F. 101; 5 R. R. 705. In the Ex. Ch. both Lord Abinger and Lord Drinan dissented.

⁴⁸ See also *Westmeath v. Salisbury* (1831) 5 Bl. N. S. 339; 35 R. R. 54. Questions may arise whether particular terms are part of the agreement for separation, and therefore subject to be so avoided, or are of a permanent and independent nature. see *Nicol v. Nicol* (1886) 31 Ch. Div. 524; 55 L. J. Ch. 437.

remain suspended in order to be revived in the event of a renewed separation, it might become equivalent to a contract providing for a contingent separation at a future time: and such a contract, as will immediately be seen, is no allowable. However, a substantive and absolute declaration of trust by a third person contained in a separation deed has been held not to be avoided by a reconciliation.⁴⁴

As to all agreements or provisions for a *future* separation, whether post-nuptial⁴⁵ or ante-nuptial,⁴⁶ "and whether proceeding from the parties themselves or from another person," it remains the rule of law that they can have no effect.⁴⁷ If a husband and wife who have been separated are reconciled, and agree that in case of a future separation the provisions of a former separation deed shall be revived, this agreement is void.⁴⁸

But where a separation order has been made on a wife's complaint, and she afterwards agrees to return to her husband on terms, a term that, in the event of future misconduct and another separation order, he shall pay her a fixed annuity is not against public policy.⁴⁹ A condition in a marriage settlement varying the disposition of the income in the event of a separation is void.⁵⁰ So is a limitation over (being in substance a forfeiture of the wife's life interest) in the event of her living separate from her husband through any fault of her own: though it might be good, it seems, if the event were limited to misconduct such as would be a ground for divorce or judicial separation.⁵¹ Otherwise as to a clause in a reconciliation deed between a husband and wife living apart whereby the trusts are varied in the event of future proceedings for a divorce.⁵²

Likewise a deed purporting to provide for an immediate separation is void if the separation does not in fact take place: for this shows that an immediate separation was not intended, but the thing was in truth a device to provide for a future separation.⁵³ Nor can such a deed be supported as a voluntary settlement.⁵⁴

The distinction rests on the following ground:—An agreement

⁴⁴ *Ruffles v. Alston* (1875) L. R. 19 Eq. 539; 44 L. J. Ch. 388.

⁴⁵ *Marquis of Westmeath v. Marchioness of Westmeath* (1820-1) 1 Dow & Cl. 519, 541; *Westmeath v. Salisbury* (1831) 5 Bli. N. S. 339, 35 R. R. 54.

⁴⁶ *H. v. W.* (1857) 4 K. & J. 482, 112 R. R. 196. Some of the reasons given in this case (2 K. & J. at 386) cannot since *Hunt v. Hunt* be supported.

⁴⁷ *Cartwright v. Cartwright* (1853) 3 D. M. G. 982, 22 L. J. Ch. 841; 98 R. R. 405, note that this and the case last cited were after *Wilson v. Wilson*.

⁴⁸ [*Dauv. v. Elmstie* [1938] 1 K. B. 337, 107 L. J. K. B. 113, shows that an agreement for temporary physical separation is not necessarily an agreement for "separation" in the more technical sense of the word.]

⁴⁹ *Harrison v. Harrison* [1910] 1 K. B. 35; 79 L. J. K. B. 133.

⁵⁰ See note ⁴¹.

⁵¹ See note ⁴⁰.

⁵² *Meyrick's Settlement* [1921] 1 Ch. 311; 90 L. J. Ch. 152. [See, too, *Lurie v. Lurie* (1938) 54 T. L. R. 889, and, as to the effect of a subsequent decree of nullity of marriage, *Fouke v. Fouke* [1938] Ch. 774, 107 L. J. Ch. 350.]

⁵³ *Hindley v. Marquis of Westmeath* (1827) 6 B. & C. 200; 30 R. R. 290; confirmed by *Westmeath v. Salisbury* (1831) 5 Bli. N. S. 339, 395-7; 35 R. R. 54, 55.

⁵⁴ *Bindley v. Mulloney* (1869) L. R. 7 Eq. 343.

for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact become inevitable. Still that state of things is abnormal and not to be contemplated beforehand. "It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate."³ Or in other words, to allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves.⁴

IMMORAL PUBLICATIONS

It is a well established rule that no enforceable right can be acquired by a blasphemous, seditious or indecent publication whether in words or in writing or by any contract in relation thereto,⁵ but it does not really belong to the present head. The ground on which the cases proceed is that the publication is or would be a criminal offence, not merely immoral, but illegal in the strict sense. The criminal law prohibits it as *malum in se* and the civil law takes it from the criminal law as *malum prohibitum*, and refuses to recognize it as the origin of any right. Then the decisions in equity profess simply to follow the law by refusing in a doubtful case to give the aid of equitable remedies to alleged legal rights until the existence of the legal right is ascertained.⁶ It would perhaps be difficult to assert as an abstract proposition that a Court administering civil justice might not conceivably pronounce a writing or discourse immoral which yet could not be the subject of criminal proceedings. But we do not know of such a jurisdiction having ever in fact been exercised, and considering the very wide scope of the criminal law in this behalf,⁷ it seems unlikely that there should arise any occasion for it. Some expressions are to be found which look like claims on the part of purely civil Courts to exercise a general moral censorship apart from any reference to the criminal law. But these are overruled by modern authority. At the present day it is not

³ 3 K. & J. 782, 112 R. R. 197.

⁴ Agreements between husband and wife contemplating a future judicial separation or separation de corps are void in French law. *Surey & Gilbert on Code Nap.* art. 1133, no. 55.

⁵ The modern law of blasphemy is laid down by the House of Lords in *Romeau v. Newar Society* [1917] A. C. 406, 86 L. J. Ch. 568, overruling some decisions and many dicta.

⁶ *Glyn v. Weston Feature Film Co.* [1916] 1 Ch. 261, 85 L. J. Ch. 261.

⁷ A somewhat analogous question is raised by deceptive trade marks and titles. A trade mark likely to deceive the public will not be registered. *Eno v. Dunn* [1890] 15 App. Cas. 252, 63 L. J. 6. There is no copyright in a work of which the title or description is a fraud on the public. *Wright v. Tallis* (1845) 1 C. B. 303, 68 R. R. 852.

⁸ E.g., *Stockdale v. Onstyn* (1826) 5 B. & C. 179, 20 R. R. 207.

⁹ *Soudry v. Sherwood* (1817) 2 Mer. 435, *Laurenz v. Smith* (1822) Jac. 471; 23 R. R. 123.

¹⁰ See Russell on Crimes, (9th ed. 1936) II, 1366 seq., and Stephen's Digest of the Criminal Law, arts. 246-248.

true that "the Court of Chancery has a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality," as was once laid down by Lord Maclesfield; or that "the Lord Chancellor would grant an injunction against the exhibition of a libellous picture," as was laid down by Lord Ellenborough."⁷⁸ On the whole it seems that for all practical purposes the civil law is determined by and co-extensive with the criminal law in these matters: the question in a given case is not simply whether the publication be immoral but whether the criminal law would punish it as immoral.

3. AGREEMENTS CONTRARY TO PUBLIC POLICY

See "Note on public policy," page 289.

Before we go through the different classes of agreements which are void as being of mischievous tendency in some one of certain different ways, something must be said on the more general question of the judicial meaning of "public policy." That question is, in effect, whether it is at the present time open to courts of justice to hold transactions or dispositions of property void simply because in the judgment of the Court it is against the public good that they should be enforced, although the grounds of that judgment may be novel. The general tendency of modern ideas has been against the continuance of such a jurisdiction. On the other hand there is a good deal of modern and even recent authority which makes it difficult to deny its continued existence.

As a matter of history, there seems to be little doubt that the doctrine of public policy, so far as regards its assertion in a general form in modern times, if not its actual origin, arose from wagers being allowed as the foundation of actions at common law.

[With all deference to the author, there are clear signs of the doctrine in our law long before its application to wagers. Indeed, his inclusion of maintenance and champerty under this heading is inconsistent with his proposition, for the law against them goes back at least as far as Edward I. We have examined the history of public policy elsewhere,⁷⁹ and need not go into its details here. It is enough to note that one hears of it in contracts in restraint of trade as early as Elizabeth, and it was clearly recognized in that connection in *Mitchell v. Reynolds* (1711).⁸⁰ Then it played a large part in that great decision on the rule against perpetuities, the *Duke of Norfolk's case* (1681).⁸¹ It appears, too, in sales of offices⁸² and in marriage contracts.⁸³]

⁷⁸ *Emperor of Austria v. Day and Kossuth* (1861) 3 D. F. J. 217, 238; 30 L. J. Ch. 690; 130 R. R. 101.

⁷⁹ [Harvard Law Review (1928), 76-102.]

⁸⁰ [1 P. Wms. 181, 183.]

⁸¹ [3 Ch. Cas. 1, 20, 49, 51.]

⁸² [*Chesterfield v. Janssen* (1750) 1 Atk. 339, 352.]

⁸³ [*Ib.* 352.]

As to wagers, their validity was assumed without discussion until the judges repented of it too late. Regretting that wagers could be sued on at all,⁸⁸ they were forced to admit that wagering contracts as such were not invalid, but set to work to discourage them as far as they could. This they did by becoming "astute even to an extent bordering upon the ridiculous to find reasons for refusing to enforce them" in particular cases.⁸⁹

Thus a wager on the future amount of hop duty was held void, because it might expose to all the world the amount of the public revenue, and Parliament was the only proper place for the discussion of such matters.⁹⁰ Where one proprietor of carriages for hire in a town had made a bet with another that a particular person would go to the assembly rooms in his carriage, and not the other's it was thought that the bet was void, as tending to abridge the freedom of one of the public in choosing his own conveyance, and to expose him to "the inconvenience of being importuned by rival coachmen."⁹¹ A wager on the duration of the life of Napoleon was void, because it gave the plaintiff an interest in keeping the king's enemy alive, and also because it gave the defendant an interest in compassing his death by means other than lawful warfare.⁹² This was probably the extreme case, and has been remarked on as of doubtful authority.⁹³ But the Judicial Committee held in 1848, on an Indian appeal (the Gaming Act, 1845 (8 & 9 Vict. c. 109) not extending to British India,) that a wager on the price of opium at the next Government sale of opium was not illegal.⁹⁴ The common law was thus stated by Lord Campbell in delivering the judgment:—

"I regret to say that we are bound to consider the common law of England to be that an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy. I look with concern and almost with shame on the subterfuges and contrivances and evasions to which judges in England long resorted in struggling against this rule."⁹⁵

Yet the decisions so produced and so reflected upon have been relied on as establishing a distinction of importance between cases where the parties "have a real interest in the matter, and an

⁸⁸ *Good v. Elliott* (1790) 3 T. R. 693; 1 R. R. 803, where Buller J. proposed (without success) to hold void all wagers on events in which the parties had no interest.

⁸⁹ *Per Parke B. Egerton v. Earl Brownlow* (1853) 4 H. L. C. at 124; *per Williams J. ib.* 77; *per Alderson B. ib.* 109.

⁹⁰ *Althorpe v. Beard* (1788) 2 T. R. 610; 1 R. R. 556.

⁹¹ *Eltham v. Kingsman* (1818) 1 B. & Ald. 683; 19 R. R. 417; this, however, was not strictly necessary to the decision.

⁹² *Galbraith v. Sykes* (1812) 16 East, 150; 14 R. R. 327.

⁹³ *By Alderson B. in Egerton v. Earl Brownlow*, 4 H. L. C. 109, and in the Privy Council in the case next cited, 6 Moo. P. C. 318; 79 R. R. 64, 65.

⁹⁴ *By the Indian Contract Act*, s. 30, agreements by way of wager are now void, with an exception in favour of prizes for horse-racing of the value of Rs. 500 or upwards.

⁹⁵ *Ramell Thackoreydas v. Soojumull Dhondmull* (1848) 6 Moo. P. C. 300, 310; 79 R. R. 62, 63.

apparent right to deal with it " and where they " have no interest but what they themselves create by the contract "; that in the former case the agreement is void only if " directly opposed to public welfare," but in the latter " any tendency whatever to public mischief " will render it void.²² It is difficult to accept this distinction, or at any rate to see to what class of contracts other than wagers it applies. In the case of a lease for lives (to take an instance often used) the parties " have no interest but what they themselves create by the contract " in the lives named in the lease: they have not any " apparent right to deal with " the length of the Sovereign's or other illustrious persons' lives as a term of their contract; yet it has never been doubted that the contract is perfectly good.

The most remarkable modern case on the general doctrine of " public policy " is *Egerton v. Earl Brownlow*.²³ By the will of the seventh Earl of Bridgewater a series of life interests²⁴ were limited, subject to provisos which were generally called conditions, but were really conditional limitations by way of shifting uses upon the preceding estates.²⁵ The effect of these was that if the possessor for the time being of the estates did not acquire the title of Marquis or Duke of Bridgewater, or did accept any inferior title, the estates were to go over. The House of Lords held by four to one,²⁶ in accordance with the opinion of two judges²⁷ against eight²⁸ that the limitations were void as being against public policy. It was admitted that they were drawn with great skill and unimpeachable in form. But, according to the view which prevailed, they amounted in substance to a gift of large pecuniary means to be used in obtaining a peerage and retained only on condition of obtaining it, and a gift on such terms even apart from any temptation to actual corruption, tended to the exercise of improper influence and the introduction of improper motives in the exercise of the Sovereign's discretion.

The fullest reasons on the side of the actual decision are those of Pollock C.B. and Lord St. Leonards. Their language is very general, and they go far in the direction of claiming an almost unlimited right of deciding cases according to the judge's view of public policy for the time being. [This view was regarded by Lord Wright in *Fender v. St. John-Mildmay* (p. 289) as now unaccept

²² (1853) 4 H. L. C. 148

²³ (1853-4) 4 H. L. C. 1, 270, 94 R. R. 1

²⁴ Not estates of freehold with remainder to first and other sons in tail in the usual way, but a chattel interest for 99 years, if the taker should so long live, remainder to the heirs male of his body. See *Dav. Conv.* 3, pt. 1, 351.

²⁵ See Lord St. Leonards' judgment, 4 H. L. C. at 208; 94 R. R. at 82.

²⁶ Lords Lyndhurst, Brougham, Truro, and St. Leonards, against Lord Cranworth, who had heard the case in the first instance as Chancellor, 1 Sim. N. S. 464; 94 R. R. 12, n. Lord Cranworth could not see his way to avoiding this will on the ground of public policy after the *Thelluson* will had been allowed.

²⁷ Pollock C. B. and Platt B.

²⁸ Crompton, Williams, Cresswell, Talfourd, Wightman, and Erle JJ., Alderson and Parke BB. Coleridge J. thought the limitations good in part only.

able," and there is no doubt that the noble and learned lord was stating current law on the point.] Lord St. Leonards mentioned the fluctuations of the decisions on agreements in restraint of trade as showing that rules of common law have been both created and modified by notions of public policy.¹ He also said that each case was to be decided upon principle, but abstract rules were not to be laid down.² If this means only that the Court is to be guided by recognized principles but will not and cannot bind itself by verbal definition, and in the application of constant principles must have due regard to any new or special facts the proposition is correct and important, though by no means confined to this topic, but if it means to say that the Court may lay down new principles of public policy without any warrant even of analogy it seems unwarranted and is not likely to be followed, as will be seen from the later authorities. The practical value of the case is a warning to draftsman. If Lord St. Leonards had been free to speak colloquially he might have said: "You have your name and arms clause which is well settled, but we do not mean to encourage any new fangled shifting limitations and experiments of that sort are at your clients peril." The zeal of the House of Lords for keeping the fountain of honour pure looks to a conveyancer's eye by no means unminged with dislike to fancy conveyancing. Later it was decided that the reasons given do not apply to the case of a *batoneter*, that being a mere title of honour which carries no political functions.³

Egerton v. Earl Brownlow however is certainly a cardinal authority for one rule which applied in all cases of public policy—namely that the tendency of the transaction at the time, not its actual result, must be looked to.⁴ It was urged in vain that the will of the seventh Earl of Bridgewater had in fact been in existence for thirty years without producing any visible ill effects.⁵

The prevailing modern view is expressed by the following remarks of Sir G. Jessel:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall

¹ [1938] A.C. 1, 40, 41.

² See as to the variation of the "policy of the law" in general, *Franturel v. Franturel* (1874) L.R. 6 C.P. at 29, 43 L.J. C.P. 38.

³ 4 H.L.C. 238-9, 94 R.R. 104.

⁴ There was a professional tradition that Lord Eldon had known of these dispositions and expressed a private opinion that they could not be supported.

⁵ *Re Wallace* [1920] 2 Ch. 274, 80 L.J. Ch. 450, C.A.

⁶ [50, 100, *Fender v. St. John-Mildmay* [1938] A.C. 1 (especially 13), 106 L.J.K.B. 641.]

⁷ *Co. Da Costa v. Jones* (1778) Cowp. 729. Wager on sex of third person void, as offensive to that person and tending to indecent evidence notwithstanding it did not appear that the person had made any objection, and the cause had in fact been tried without any indecent evidence.

be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.”

In the House of Lords itself it was said at the beginning of this century that no Court can invent a new head of public policy and that “public policy is always an unsafe and treacherous ground for legal decision, ‘a very unstable and dangerous foundation on which to build until made safe by decision.’” We may be pretty sure, therefore, that no further attempts in this direction will be made in our time,⁹ nor will the particular doctrine of *Egerton v. Brownlow* be extended.¹⁰

[NOTE ON PUBLIC POLICY—The doctrine was again reviewed by the House of Lords in the recent case of *Fender v. St John H. Mildmay*,¹¹ the facts of which have been referred to (p. 267). The House were emphatically against the extension of public policy, and Lord Wright found it difficult to conceive that nowadays any new head of public policy could be discovered.¹² Yet neither he nor the other lords went so far as to adopt without qualification the view that the categories of public policy are closed. Lord Atkin regarded this as too rigid, but nevertheless useful as a warning that “the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.” So too Lord Thankerton: “the duty of the Courts is to expound and not to expand such policy. That does not mean that they are precluded from applying an existing principle of public policy to a new set of circumstances where such circumstances are clearly within the

⁹ *Printing and Numerical Registering Co. v. Sampson* (1875) 1 R. 19 Eq. 462, 46, 44 L. J. Ch. 705. Sir G. Jessel’s opinion has been followed to the extent of supporting a provision that an award or the certificate of an architect or other person appointed to decide matters in dispute shall not be impeached even on the ground of fraud. *Tullis v. Jackson* [1892] 3 Ch. 441, 61 L. J. Ch. 655. But see per Scrutton L.J. *Czarnikow v. Roth Schmidt & Co.* [1922] 2 K. B. 478, 486, 92 L. J. K. B. 81. In any case the economic sanctity of contract does not now stand where it did in the nineteenth century.

¹⁰ *Janson v. Driefontein Consolidated Mines* [1902] A. C. 484, 491, 500, 507, 71 L. J. K. B. 857 (Lord Halsbury, Lord Davey, Lord Lindley).

¹¹ A contract to convey land on a contingency not necessarily within the limits of the rule against perpetuities is not invalid, for the rule has nothing to do with merely personal contracts, but it will not be specifically enforced, for it cannot be recognized as creating any equitable interest. *Worthing Corporation v. Heather* [1906] 2 Ch. 532, 75 L. J. Ch. 761. This curious but correct result follows from the strict application of positive rules and does not depend on any doctrine of policy.

¹² *Re Borwick* [1933] Ch. 657, 668, 102 L. J. Ch. 199, is the only recent case which appears to be at all analogous. A clause in a voluntary settlement declared concerning a class of beneficiaries “the settlor’s grandchildren, that any of them who shall at any time before attaining a vested interest be or become a Roman Catholic or not be openly or avowedly Protestant shall thereupon forfeit and lose one moiety of” his or her benefit under the settlement. Held void as tending to fetter parents’ conscientious discretion in the religious instruction of their children, also for uncertainty.

¹¹ [1938] A. C. 1, 106 L. J. K. B. 641. See, too, *Beresford v. Royal Insurance Co., Ltd.* [1938] A. C. 586, 107 L. J. K. B. 464 (H. L.).

¹² [1938] A. C. at 40. See, too, his judgment as M.R. in *Beresford v. Royal Insurance Co., Ltd.* [1937] 2 K. B. 197, when that case was before the C.A., and his extra-judicial views in his *Legal Essays* (1939), 66–95.]

¹³ [1938] A. C. at 11–12.]

scope of the policy."¹⁴ Again, Lord Roche said: "Now to evolve new heads of public policy or to subtract from existing and recognized heads of public policy if permissible to the Courts at all which is debatable, would in my judgment certainly only be permissible upon some occasion as to which the legislature was for some reason unable to speak and where there was substantial agreement within the judiciary and where circumstances had fundamentally changed."

Definitions of public policy have differed,¹⁵ but perhaps it may be described as a principle of judicial legislation or interpretation founded on the current needs of the community. Frequently in considering the interests of the public as a whole, the interests of a section of it have been taken into account in actual decisions in which the question of public policy has been raised, but the seeming paradox is explained by the fact that, although these decisions may relate primarily to sectional interests (e.g., those of traders) they nevertheless reckon with the interests of the community at large—a notable example is covenants in respect of trade. Another characteristic of public policy abundantly supported by its history is its variability. Thus many of the decisions on restraint of trade not much more than half a century old are now museums of fossil economic theories. Again 150 years ago *Paine's Age of Reason* was held to be a blasphemous libel,¹⁶ but, in 1917, the House of Lords held that apart from scurrility or profanity an attack upon Christianity is not blasphemous.¹⁷ So too in James I's reign a baronetcy was purchasable for 1,007*l*, but in 1925 a bargain for procuring a knighthood was held to be unlawful.¹⁸ New heads of public policy were often created while our law was in its formative period, but these became rare as it was implemented by judicial decisions, and the current tendency, as indicated above, is against the acceptance of new species of public policy. Yet we venture to think, that it cannot be discarded as an agency in the development of the law, for, however ripe a system may be, it must of necessity change with the changing needs of the community. Nor is that the less true because some judges may insist that public policy can be extended only by analogy with principles already established by the Courts, for in judicial decisions it is occasionally hard to mark the line between extension of an old principle and creation of a new rule. As to the methods whereby the Courts ascertain whether any given conduct does or does not accord with public policy, they

¹⁴ [1938] A.C. at 23.]

¹⁵ [Ib. 54-55. Lord Roche was one of the dissentient lords, but that does not affect the point in this quotation.]

¹⁶ [This paragraph is based to some extent on the editor's "Public Policy in the English Common Law," 42 *Harvard Law Review* 1928, 76-102.]

¹⁷ *R. v. Williams* [1977] 26 St. Tr. 653.]

¹⁸ *Bowman v. Secular Society* [1917] A.C. 406.]

¹⁹ [*Parkinson v. College of Ambulances, Ltd.* [1925] 2 K.B. 1. See Lord Haldane's remarks in general on the influence of public policy, in *Rodriguez v. Speyer Bros* [1919] A.C. 59, 77, 81.]

naturally proceed on the analogy of precedents where precedents exist. Where the point is *primae impressionis*, it has been said that the basis of their decision is "the opinions of men of the world, as distinguished from opinions based on legal learning."²⁰ In practice, this presumably means that the judge must use his judicial discretion as guided by the arguments presented to him by counsel. It does not signify that he is entitled to rely upon his own personal opinion of what is good for the community."²¹ Finally, two limits on the application of public policy may be noticed. First, arguments based upon it are irrelevant where they relate to a rule of the common law that is already clearly settled. Secondly, public policy is emphatically not an ideal standard to which the law ought to conform. No doubt the founders of our law spoke of "reason," "the law of reason," the "law of nature" with a vision of some ethical abstraction to which they wished to make the law conform, but that vision has long passed from public policy as we now understand the phrase.]

We now proceed to the several heads of the subject.

(a) First, as to matters concerning the commonwealth in its relations with foreign powers.

"On the principles of the English law it is not competent to any domiciled British" "subject to enter into a contract to do anything which may be detrimental to the interests of his own country."

An agreement may be void for reasons of this kind either when it is for the benefit of an enemy, or when the enforcement of it would be an affront to a friendly State. Incidents arising out of the war of 1914—1918 gave rise to many litigated questions: the decisions, while they extended in some respects the application of the older rules against dealing with the King's enemies, wholly confirmed them in principle. The leading authorities stand good and there is little to alter in a broad statement of their results.

It is material to observe that for this purpose the King's enemies are not co-extensive with persons of enemy nationality. Whoever carries on business or willingly resides in a hostile country is deemed an enemy;²² so may a company registered under English law be, if in fact its business is carried on in a hostile country or controlled by persons of hostile character.²³ On the other hand

²⁰ [Lord Haldane, *ib.* 79.]

²¹ [Lord Wright in *Fender v. St. John-Mildmay* [1938] A. C. at 40—41. See, too, the citation from Lord Atkin, p. 289.]

²² The rule does not apply to British subjects domiciled abroad: *Bell v. Reid* (1813) 1 M. & S. 726; 14 R. R. 557. ²³ 7 E. & B. 782; 110 R. R. 825.

²³ *Porter v. Freudenberg* [1915] 1 K. B. 857; 84 L. J. K. B. 1001, C. A.

²⁴ *Daimler Co.'s case* [1916] 2 A. C. 307; 85 L. J. K. B. 1333. [*Glenroy Case* [1945] A. C. 124] Cp. the *Clapham S.S. Co.'s case* [1917] 2 K. B. 639; 86 L. J. K. B. 1439, where a technically neutral company was under enemy control. [American law does not ignore the artificiality of the corporation to this extent; its policy is "to deny only those privileges which might aid the enemy in the prosecution of the war": Williston, *Contracts*, § 1747; see, too, *Restatement of Contracts*, §§ 594—596.]

it seems that a subject of a hostile Power residing here or in an allied country with licence, or in a neutral country, and not doing business in the hostile country, is not an enemy for the present purpose.

TRADING WITH ENEMY²⁴

It is now fully established that, the presumed object of war²⁵ being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal.²⁶ And the doctrine "applies to all contracts which involve intercourse with the enemy or tend to assist the enemy, even though no enemy be a party to the contract."²⁷

Potts v. Bell,²⁸ decided by the Exchequer Chamber in 1800, is still a leading authority on this subject. The following points were there decided:

It is a principle of the common law—that trading with an enemy without licence from the Crown is illegal.

Purchase of goods in an enemy's country during the war is trading with the enemy, though it be not shown that they were actually purchased from an enemy—and an insurance of goods so purchased is void.

As to insurances originally effected in time of peace.—When a British subject insured against captures, the law infers that the contract contains an exception of captures made by the government of his own country.—There is no rule of public policy to prevent insurance of a subject of a foreign State against "arrests of all kings, princes, and peoples" from including seizure by that State before, though shortly before, the outbreak of war with Great Britain, where the policy is sued on after the war is over.²⁹

During the war of 1914–1918 the common law as to trading and intercourse with enemies was reinforced by emergency legislation and proclamations and orders thereby authorized, (and the same applies to the recent war.)

²⁴ [A recent monograph on the topic is Blum and Rosenbaum's "Trading with the Enemy" (1940). It takes account of the Trading with the Enemy Act, 1939 (2 & 3 Geo. 6, c. 89), and other legislation due to the recent war. See too McNair *Legal Effects of War*, 2nd ed. (1944), Ch. 7. As to the effect of war on contracts in general, see the works referred to, p. 225, note ²³.]

²⁵ [The meaning of "war" is considered in McNair, *op. cit.* Ch. 1.]

²⁷ *Esposito v. Bowden* (1857) in Ex. Ch. 17 E. & B. 764, 770, 27 L. J. Q. B. 17, 110 R. R. 822, 823; *Kershaw v. Arley*, 100 Mass. 501, and see per Lord Daves [1902] A. C. 499.

²⁸ *Re Badische Co., Off.* [1921] 2 Ch. 371, 373, 91 L. J. Ch. 133.

²⁹ (1800) 8 T. R. 548, 5 R. R. 452.

³⁰ In the Admiralty it was already beyond question: see the series of precedents cited in *Potts v. Bell*.

³¹ *Furiedo v. Rodgers* (1802) 3 B. & P. 191, 200, 6 R. R. 752; *Ex parte Lee* (1806) 13 Ves. 64; *Jensen v. Driffton Consolidated Mines* [1902] A. C. at 499.

³² *Jensen v. Driffton Consolidated Mines* [1902] A. C. 484; 71 L. J. K. B. 857.

The effect of the outbreak of war upon subsisting contracts between subjects of the hostile states varies according to the nature of the case. It may be that the contract can be lawfully performed by reason of the belligerent governments or one of them having waived their strict rights: and in such case it remains valid. In *Clementson v. Blessig*¹⁹ goods had been ordered of the plaintiff in England by a firm at Odessa before the declaration of war with Russia. By an Order in Council six weeks were given after the declaration of war for Russian merchant vessels to load and depart, and the plaintiff forwarded the goods for shipment in time to be lawfully shipped under this order: it was held that the sale remained good.

If the contract cannot at once be lawfully performed, then it may be suspended during hostilities "unless the nature or objects of the contract be inconsistent with a suspension, in which case the effect is to dissolve the contract and to absolve both parties from further performance of it." But suspension is not admissible if a continuing relation of the parties under the contract would involve or facilitate intercourse with enemies; and an express clause providing for suspension may be inoperative either as not applying to a war in which this country is a belligerent, or as tending to the advantage of enemies and so being against public policy.* On the whole the cases in which suspension as distinct from total abrogation of the contract is allowable must now be considered exceptions. In any case a party to an executory contract dissolved by war cannot continue to act on any authority created by the contract.† Total abrogation may also be the result of the main intention of the parties being frustrated in the events which have happened, apart from any question of public policy. We have spoken of this in the foregoing chapter.

Similar considerations apply to the manner of performing pre-war contracts even where both parties are the King's subjects or friends.*

¹ (1855) 11 Ex. 135; 105 R. R. 451, and on the subject generally, see the reporters' note, 11 Ex. 141-145; 105 R. R. 455-458.

¹⁴ *Ex parte Bousmaker* (1806) 13 Ves. 71; 9 R. R. 142. [Sir Arnold McNair, *Legal Effects of War* (2nd ed.), 99, in referring to suspension by law (i.e., apart from any stipulation for suspension in the contract itself), cites only one case as a true illustration of it—*Robson v. Premier Oil and Pipe Line Co.* [1915] 2 Ch. 124 (C. A.) (shareholder's contract of membership of a company).]

¹⁵ *Esposito v. Bowden* (1857) 7 E. & B. 763, 783; 27 L. J. Q. B. 17 (in Ex. Ch.) revg. s. c. 4 E. & B. 969; 24 L. J. Q. B. 210; 110 R. R. 822, 825. For a later application of the same reason of convenience, cp. *Gripel v. Smith* (1872) L. R. 7 Q. B. 404; 41 L. J. Q. B. 153. A contract to carry goods was once held to be only suspended by a temporary embargo, though it lasted two years: *Hadley v. Clarke* (1799) 8 T. R. 259; 4 R. R. 641. But we must regard this as overruled by *Esposito v. Bowden* and the later authorities.

¹⁶ *Eitel Bieber & Co. v. Rio Tinto Co.* [1918] A. C. 260; 87 L. J. K. G. 531. [*Fried Krupp Aktien Gesellschaft v. Orconera Iron Ore Co.* (1919) 88 L. J. Ch. 304. *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1943] A. C. 32, 40-41; 111 L. J. K. B. 433.]

¹⁷ *Jihara v. Ottoman Bank* [1927] 2 K. B. 254, C. A.; 96 L. J. K. B. 581.

¹⁸ *Arnhold Karberg & Co. v. Blythe & Co.* [1916] 1 K. B. 495; 85 L. J. K. B. 665, C.A.

The outbreak of a war dissolves a partnership previously existing between subjects of the two hostile countries.²⁹

[In *Schering, Ltd. v. Stockholms Enskilda Bank, Ltd.*,³⁰ the Court of Appeal laid down the following rules in relation to the effect of the outbreak of war on a contract previously made between a British subject and a neutral subject. (1) The contract is not abrogated unless it be proved either that its performance will in fact enhance the resources of the enemy or that at least there is a substantial probability that it will do so. (2) A suspensory clause in the contract postponing performance until after the end of the war is valid unless it be proved either that the continued existence of the contract will in fact tend to increase the resources of the enemy or that there is a substantial probability that this will occur;³¹ and the Court were of opinion that the rule is the same where the suspension of the contract is imposed by law.³² These rules maintain a satisfactory balance between the principle that "the maintenance of commercial relations and the loyal performance of contracts with neutrals are matters which it is to the interest of this country to encourage,"³³ and the principle that the resources of an enemy must not be increased.]

In *Esposito v. Boudier*,³⁴ a neutral ship was chartered to proceed to Odessa, and there load a cargo for an English freighter, and before the ship arrived there war had broken out between England and Russia, and continued till after the time when the loading should have taken place: here the contract could not be performed without trading with the enemy, and in such a case it is convenient that it should be dissolved at once, so that the parties need not wait indefinitely for the mere chance of the war coming to an end, or its otherwise becoming possible to perform the contract lawfully.

Questions have arisen on the validity of bills of exchange drawn on England in a hostile country in time of war. Here the substance of the transaction has to be looked at, not merely the nationality of the persons who are ultimately parties to an action on the bill. Where a bill was drawn on England by an English prisoner in a hostile country, this was held a lawful contract, being

²⁹ *Griswold v. Waddington* (1818) 15 Johns. (Sup. Ct. N. Y.) 37; in error 16 *ib.* 498. In *New York Life Insurance Co. v. Statham* (1876) 93 U. S. 24, a curious question arose as to the effect of the Civil War on life policies effected by residents in the Southern States with a company in the North. It was held by the majority of the Court that, the premiums having been unpaid during the war, the policies were avoided; but that in the circumstances the assured were entitled to the surrender value of their policies at the date of the first default. But the opinions that the contract was avoided without compensation, and that it revived at the end of the war, also found support.

³⁰ [1944] 1 Ch. 13. Cf. McNair, *Legal Effects of War* (2nd ed.) 238.]

³¹ [See, too, *Stockholms Enskilda Bank Aktiebolag v. Schering, Ltd.* [1941] 1 K. B. 414; 110 L. J. K. B. 220].

³² [1944] 1 Ch. at p. 26].

³³ [*Ibid.* 22-23].

³⁴ See note ²⁵. For confirmation of the authority and general application of this leading decision, see per Lord Dunedin [1918] A. C. 269.

made between English subjects; and by the necessity of the case an indorsement to an alien enemy was further held good, so that he might well sue on it after the return of peace.⁴¹ But a bill drawn by an alien enemy on a domiciled British subject, and indorsed to a British subject residing in the enemy's country, was held to give no right of action even after the end of the war: for this was a direct trading with the enemy on the part of the acceptor.⁴² It seems proper to observe that these cases must be carefully distinguished from those which relate only to the personal disability of an alien enemy to sue in our Courts during the war.⁴³

HOSTILITIES AGAINST FRIENDLY NATION

On the other hand, an agreement cannot be enforced in England which has for its object the conduct of hostilities against a power at peace with the English government, at all events by rebellious subjects of that power who are endeavouring to establish their independence, but have not yet been recognized as independent by England. This was laid down in cases arising out of loans contracted in this country on behalf of some of the South American Republics before they had been officially recognized.

"It is contrary to the law of nations, which in all cases of international law is adopted into the municipal code of every civilized country, for persons in England to enter into engagements to raise money to support the subjects of a government in amity with our own in hostilities against their government, and no right of action can arise out of such a transaction."⁴⁴

The Supreme Court of the United States has held, however, that an assignment of shares in a company originally formed for a purpose of this kind was so remotely connected with the original illegality of the loan as not to be invalid between the parties to it.⁴⁵ The decisions of that Court on aiding or trading with enemies in cases arising out of the Civil War may be consulted with profit.⁴⁶

It is not a "municipal offence by the law of nations" for citizens of a neutral country to carry on trade with a blockaded port—that is, the courts of their own country cannot be expected to treat it as illegal (though of course it is done at the risk of seizure, of which seizure, if made, the neutral trader or his government cannot complain): and agreements having such trade for their object—

⁴¹ *Antoine v. Morshed* (1815) 6 Taunt. 237; 16 R. R. 610; cp. *Daubuz v. Morshed* (1815) *ib.* 332; 16 R. R. 623.

⁴² *Willson v. Patteson* (1817) 7 Taunt. 139; 18 R. R. 525. The circumstances of the indorsement seem immaterial.

⁴³ Such are *McConnell v. Hector*, 3 B. & P. 113; 6 R. R. 724; *Brandon v. Nesbitt* (1794) 6 T. R. 23; 3 R. R. 109. As to prisoners of war here, *Sparenburgh v. Bannatyne* (1797) 1 B. & P. 163; 4 R. R. 772.

⁴⁴ *Best C. J. De Wütz v. Hendricks* (1824) 2 Bing. 314; 27 R. R. 660. Cp. *Thompson v. Paoles* (1828) 2 Sim. 194, where the language seems unnecessarily wide.

⁴⁵ *McBlair v. Gibbs* (1854) 17 Howard, 232.

⁴⁶ See *Texas v. White* (1868) 7 Wallace, 700 (where, however, the chief points are of constitutional law); *Hanauer v. Doane* (1870) 12 *ib.* 342. *Sprout v. U. S.* (1874) 20 Wall. 459, goes beyond anything in our books, and the dissent of Field J. seems well founded. [See, generally, Williston, Contracts, §§ 1747—1748.]

e.g. a joint adventure in blockade running—are accordingly valid and enforceable in the courts of the neutral State.”

FOREIGN REVENUE LAWS

It is admitted as a thing required by the comity of nations that an agreement to contravene the laws of a foreign country would in general be unlawful.” But it was formerly said that revenue laws (in practice the most important cases) are excepted, and that “no country ever takes notice of the revenue laws of another.” This is disapproved by most modern writers as contrary to reason and justice,” and inconsistent with the general tendency of recent authority.” [But an action will not lie in England for the recovery of taxes, whether national or municipal, levied by some other state.”] It should be noted that our Courts, so far as they have acted upon it, have done so to the prejudice of our own revenue quite as much as to that of foreign States. Thus a complete sale of goods abroad by a foreign vendor was valid, and the price recoverable in an English Court, though he knew of the buyer’s intention to smuggle the goods into England. “The subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this.” But it is admitted that an agreement to be performed in England in violation of English revenue laws would be void—as if, for example, the goods were to be smuggled by the seller and so delivered in England. And a subject domiciled in the British dominions (though not in England or within the operation of English revenue laws) cannot recover in an English Court the price of goods sold by him to be smuggled into England; and even a foreign vendor cannot recover if he has himself actively contributed to the breach of English revenue laws, as by packing the goods in a manner suitable and to his knowledge intended for

⁴⁷ *Ex parte Chaise* 1865, 4 D. S. J. 655; see Lord Westbury’s judgment: *The Helen* (1875) L. R. 1 Ad. & Ecc. 1; 34 L. J. Ad. 2, and American authorities there cited; Kent, Comm. 3, 267.

⁴⁸ [So, too, American law: Williston, Contracts, § 1749; Restatement of Contracts, § 592.] There is a curious example, *Foster v. Driscoll* [1929] 1 K. B. 470, C. A.; 98 L. J. K. B. 282, of a group of actions arising out of the operations of a syndicate formed to convey a cargo of whisky to the United States, contrary to the Prohibition law then in force; the scheme being so elaborately disguised that in the opinion of one member of the Court there was room enough for a lawful performance of the ostensible agreement (though contemplated by none of the parties) to save it. The Prohibition amendment of the U.S. Constitution and the incidental Federal legislation, now repealed, were of course not revenue laws.

⁴⁹ Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp. 341.

⁵⁰ E.g. Kent, Comm. 3, 263–266; Dicey, Conflict of Laws, 26 n., 657–599.

⁵¹ See especially *Ralli Bros. v. Compania Naviera* [1920] 2 K. B. 287; 89 L. J. K. B. 999, C. A., though that special class of cases is not there dealt with. [The tendency in American law is against the legality of such contracts: Williston, Contracts, § 1749.]

⁵² *Sydney (Municipal Council) v. Bull* [1909] 1 K. B. 7; 78 L. J. K. B. 45. See Cheshire, Private International Law (2nd ed. 1938), 135–136.]

⁵³ *Holman v. Johnson* (1775) 1 Cowp. 341; *Palletal v. Angell* (1835) 2 C. M. & R. 311–3; 41 R. R. 723, per Lord Abinger C.B.

⁵⁴ *Cleaves v. Pinaluna* (1791) 4 T. R. 466; 2 R. R. 442. It seems but it is not quite certain, from this case, that mere knowledge of the buyer’s intention would disentitle him.

the purpose of smuggling." The cases upholding contracts of this kind, whether as against our own or as against foreign laws, would certainly not be now extended beyond the points specifically decided by them and very possibly not upheld.⁵¹ There is one modern case which looks at first sight like an authority for saying that our Courts pay no regard to foreign shipping registration laws but it really goes upon a different principle and besides, the law of the United States was not properly brought before the Court.⁵²

As to instruments which cannot be used in their own country for want of a stamp it is now settled that regard will be paid by the Courts of other States to the law which regulates them and the only question is as to the real effect of that law. If it is a mere rule of local procedure requiring the stamp to make the instrument admissible in evidence a foreign Court not being bound by such rules of procedure will not reject the instrument as evidence it is otherwise if the local law makes a stamp necessary to the validity of the instrument *i.e.* a condition precedent to its having any legal effect at all.

(b) As to matters touching good government and the administration of justice

CORRUPT INFLUENCE

It is needless to produce authorities to show that an agreement whose object is to induce any officer of the State whether judicial or executive to act partially or corruptly in his office must in any civilized country be void. But an agreement which has an apparent tendency that way though an intention to use unlawful means be not admitted or even be nominally disclaimed will equally be held void. The case of *Igerton v. Earl Brounlow* (p. 287) was decided on the principle that all transactions are void which create contingent interests of a nature to put the pressure of extraneous and improper motives upon the counsels of the Crown or the political conduct of legislators.

A decision in the American Supreme Court which happens to be of nearly the same date shows that an agreement is void which contemplates the use of underhand means to influence legislation. In *Marshall v. Baltimore and Ohio R. R. Co.* the nature of the agreement sued on appeared by a letter from the plaintiff to the president of the railway board in which he proposed a plan for obtaining a right of way through Virginia for the company.

⁵¹ *Waymell v. Read* 1794), 1 R. 599, 2 R. R. 67.

⁵² It must be remembered that the general law as to sale of goods, &c. which the seller knows will be used for an unlawful purpose is as not fully settled at the date of these authorities.

⁵³ *Sharp v. Taylor* (1849) 2 Ph. 801, 78 R. R. 298. See *Lundley on Partnership* (10th ed. 1935), 142, 143.

⁵⁴ See *Dicey, Conflict of Laws* 704, 705. *Bristol v. Sequeville* (1850) 5 Ex. 275, 19 L. J. Ex. 289, 22 R. R. 664.

⁵⁵ (1853) 16 Howard 314. [See, too, *Williston Contracts*, 1727—1729, where illustrations are given of some methods of influencing the legislature which are not unlawful.]

and offered himself as agent for the purpose. The letter pointed (though not in express terms) to the use of secret influence on particular members of the legislature: and it referred to an accompanying document which explained the nature of the plan in more detail. The document contained the following passage. - "I contemplate the use of no improper means or appliances in the attainment of your purpose. My scheme is to surround the legislature with respectable and influential agents whose persuasive arguments may influence the members to do you a naked act of justice. This is all I require - secrecy from motives of policy alone - because an open agency would furnish ground of suspicion and unmerited invective - and might weaken the impression we seek to make. The arrangement was to be as secret as practicable - the company was to have but one ostensible agent who was to choose such and so many sub-agents as he thought proper - and the payment was to be contingent on success. The actual contract was made by a resolution of the directors - according to which agents were to be employed to - superintend and further - the contemplated application to the legislature of Virginia - and to take all proper measures for that purpose - and then right to any compensation was to be contingent on the passing of the law. The Supreme Court held first - that it was sufficiently clear that the contract was in fact made on the footing of the previous communications - and was to be carried out in the manner there proposed - and secondly - that being so made it was - against public policy and void.

"It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal - or which is inconsistent with sound morals - or public policy - or which tends to corrupt or contaminate by improper influences the integrity of our social or political institutions. Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that Courts should put the stamp of their disapprobation on every act and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided." [The judgment then points out that persons interested in the results of pending legislation have a right to urge their claims either in person or by agents, but in the latter case the agency must be open and acknowledged.] "Any attempts to deceive persons intrusted with the high functions of legislation by secret combinations - or to create or bring into operation undue influences of any kind - have all the effects of a direct fraud on the public."⁴⁴

And the result of the previous authorities was stated to be -

"1st. That all contracts for a contingent compensation for obtaining legislation - or to use personal or any secret or sinister influence on legislators are "void by the policy of law."

"2nd. Secrecy as to the character under which the agent or solicitor acts tends to deception and is immoral and fraudulent, and where the agent contracts to use secret influences, or voluntarily, without contract

⁴⁴ (1853) 16 Howard, at pp. 334-5.

⁴⁵ "H" by a clerical error in the report.

with his principal, uses such means, he cannot have the assistance of a Court to recover compensation.

"3rd. That what in the technical vocabulary of politicians, is termed log-rolling" is a misdemeanour at common law punishable by indictment."¹

So in a later case² an agreement to prosecute a claim before Congress by means of personal influence and solicitations of the kind known as "lobby service" has been held void.

During the War, 1914-1918, it was held contrary to public policy for a member of the Imperial Air Fleet Committee to sue manufacturers of aircraft components for commission (under an agreement in general terms) in respect of Government employment alleged to have been obtained by his influence, his pecuniary interest not being disclosed to the official advisers.³

But as it is open to a landowner or other interested person to defend his interest by all lawful means against proposed legislation from which he apprehends injury, so it is open to him to withdraw or compromise his claims on any terms he thinks fit. There is no reason against bargains of this kind any more than against a compromise of disputed civil rights in ordinary litigation. And the lawfulness of such an agreement is not altered if it so happens that the party is himself a member of the legislature. In the absence of anything to show the contrary, he is presumed to make the agreement solely in his character of a person having a valuable interest of his own in the matter, and he is not to be deprived of his rights in that character merely because he is also a legislator.⁴

'A landowner cannot be restricted of his rights because he happens to be a member of parliament.'⁵ This may seem anomalous: but it must be remembered that in practice there is little chance of a conflict between duty and interest, as the legislature generally informs itself on these matters by means of committees proceeding in a quasi-judicial manner. Of course it would be improper for a member personally interested to sit on such a committee.

SALE OF OFFICES

On similar grounds it is said that the sale of offices (which is forbidden by statutes extending to almost every case) is also void at common law.⁶ However, there may be a lawful partnership in the emoluments of offices, although a sale of the offices themselves or a complete assignment of the emoluments would be unlawful.⁷

¹ Arrangements between members for the barter of votes on private bills.

² 16 Howard, 130.

³ *Trust v. Child* (1874) 21 Wall. 441. See too, *Meguire v. Conware* (1879) 101 U. S. 108.

⁴ *Montefiore v. Menday & Co.* [1918] 2 K. B. 241, 87 L. J. K. B. 907. The Court itself took and enforced the objection.

⁵ *Simpson v. Lord Houdon* (1839-42) 2 P. & D. 714, 10 A. & E. 793; 9 Cl. & F. 61; 50 R. R. 555.

⁶ *Kindersley v. C. in Earl of Shrewsbury v. A. Staffordshire Ry. Co.* (1865) L. R. 1 Eq. 593, 613, 35 L. J. Ch. 156.

⁷ *Hanington v. Du Chastel* (1781) 2 Swanst. 159, n.; *Hopkins v. Prescott* (1847) 1 C. B. 578, 16 L. J. C. P. 259; 72 R. R. 647, per Coltman J.

⁸ *Sterry v. Hifton* (1850) 9 C. B. 110; 19 L. J. C. P. 237; 82 R. R. 319.

The same principles are applied to other appointments which though not exactly public offices are concerned with matters of public interest. "Public policy requires that there shall be no money consideration for the appointment to an office in which the public are interested; the public will be better served by having persons best qualified to fill offices appointed to them, but if money may be given to those who appoint, it may be a temptation to them to appoint improper persons." Therefore the practice which had grown up in the eighteenth century of purchasing commands of ships in the East India Company's service was held unlawful no less on this ground than because it was against the Company's regulations.⁷⁰ In like manner an agreement to procure a title of honour for money is void even if the money is to be paid to a charity and if the payer fails to receive the promised title he is disabled, as a knowing party to an unlawful transaction, from recovering his money back.

In like manner a secret agreement to hand over to another person the profits of a contract made for the public service, such as a Post Office contract for the conveyance of mails, is void.

Nevertheless many particular offices, and notably subordinate offices in the courts of justice, were in fact saleable and the subject of sale by custom or otherwise until quite modern times. But the commission of an officer in the army could not be the subject of a valid pledge even under the old system of purchase.

For like reasons certain assignments of salaries and pensions have been held void as tending to defeat the public objects by which the original grant was intended.⁷¹ Thus military pay and judicial salaries are not assignable. The rule is that a pension for past services may be aliened, but a pension for supporting the grantee in the performance of future duties is inalienable, and therefore a pension given not only as a reward for past services, but for the support of a dignity created at the same time and for the same reason is inalienable.⁷² But an assignment by the holder of a public office of a sum equivalent to a proportionate part of salary, and secured to his legal personal representatives on his death by the terms of his appointment, is not invalid, such a sum being simply a part of his personal estate like money secured by life insurance.⁷³ A clergyman having cure of souls is not, as such, a public officer for the purpose of this rule.⁷⁴ A mortgage by an officer of the Customs of his disposable share in the "Customs

⁷⁰ *Blachford v. Preston* (1794) 8 I. R. 89, 93; 4 R. R. 398.

⁷¹ *Parkinson v. College of Ambulance* [1925] 2 K. B. 1, 93; 1 J. K. B. 1066.

⁷² *Osborne v. Williams* (1811) 18 Ves. 379, 11 R. R. 218.

⁷³ *Collyer v. Fallon* (1823) 1 & R. 459.

⁷⁴ [Laws of England (Halsbury), IV, 471-474. With respect to civil servants see Dr. Logan in I. Q. R. lxii, 244, 269.]

⁷⁵ *Davis v. Duke of Marlborough* (1818) 1 Swanst. 74, 79; 31 R. R. 29, 31. Cp. *Arbuthnot v. Norton* (1846) 5 Moo. P. C. 219. And see authorities collected in the notes to *Ryall v. Ryalls* (1749) in 2 Wh. & T. L. C.

⁷⁶ *Arbuthnot v. Norton* (1846) 5 Moo. P. C. 219.

⁷⁷ *Re Murens* [1891] 1 Q. B. 394; 60 L. J. Q. B. 397.

Annuity and Benevolent Fund" created by a special Act has been unsuccessfully disputed as contrary to the policy of the Act."

STIFLING PROSECUTIONS⁷⁸

Agreements for the purpose of 'stifling a criminal prosecution' are void as tending to obstruct the course of public justice. An agreement made in consideration ostensibly of the giving up of certain promissory notes, the notes in fact having forged indorsements upon them, and the real consideration appearing by the circumstances to be the forbearance of the other party to prosecute, was held void on this ground in the House of Lords. The principle of the law as there laid down by Lord Westbury is "That you shall not make a trade of a felony." The principal direct authority, however, is the earlier case of *Ken v. Leeman*,⁷⁹ where the Court of Queen's Bench said:—

'The principle of law is laid down by Wilmut C.J. in *Collins v. Blanton* that a contract to withdraw a prosecution for perjury and consent to give no evidence against the accused is founded on an unlawful consideration and void. (On the soundness of this decision no doubt can be entertained whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion, if guilty, the law was eluded by a corrupt compromise screening the criminal for a bribe. The cases are then reviewed.) We shall probably be safe in laying it down that the law will permit a compromise of all offences though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it."⁸²

Accordingly the Court held that an indictment for offences including not and obstruction of a public officer in the execution of his duty cannot be legally the subject of a compromise; and the judgment of the Exchequer Chamber,⁸¹ affirming this, showed some dissatisfaction even with the limited right of compromise admitted in the Court below. The Court of Appeal has since held that the compromise of any public misdemeanour, from whatever motive, is illegal,⁸² though where there is a choice of a civil or criminal remedy a compromise of criminal as well as civil proceedings may be lawful.⁸³ It is even held that an agreement to

⁷⁷ *Maclean's trusts* (1871) L. R. 10 Lq. 274.

⁷⁸ [The law is fully considered in Winfield, *Present Law of Abuse of Legal Procedure* (1921), ch. iv.]

⁷⁹ *Williams v. Bayley* 1866 L. R. 1 H. L. 200, 220, 35 L. J. Ch. 717.

⁸⁰ (1844) 6 Q. B. 308, 316, 321, 13 L. J. Q. B. 250, 66 R. R. 392, in Ex. Ch. 9 Q. B. 371; 15 L. J. Q. B. 360, 72 R. R. 208.

⁸¹ (1767) 2 Wilson, 341; 1 Sm. L. C. 406, 409-414.

⁸² Acc. in *Clubb v. Hutson* (1865) 18 C. B. N. S. 414; 144 R. R. 550, held that forbearance to prosecute a charge of obtaining money by false pretences is an illegal consideration. What if there is no real ground for a prosecution, the supposed offence being an act not criminally punishable? See per Fry J. 8 Ch. D. at 477. It is submitted that the agreement would be void for want of consideration.

⁸³ 9 Q. B. at 392.

⁸⁴ *Windhill Local Board v. Vint* (1890) 45 Ch. Div. 351; 59 L. J. Ch. 608.

⁸⁵ *Fisher & Co. v. Apollinaris Co.* (1875) L. R. 10 Ch. 297; 44 L. J. Ch. 500.

compound an offence in a foreign country whose law does not forbid such agreements is not actionable here."

There need not be an express agreement not to prosecute. An understanding to that effect, shown by the circumstances to be part of the transaction, will be enough. And, since the defence of illegality in cases of this kind is allowed on public grounds, it must be allowed even if the Court thinks it discreditable to the party setting it up."

It is not compounding felony for a person whose name has been forged to a bill to adopt the forged signature and advance money to the forger to enable him to take up the bill. It is doubtful whether a security given by the forger for such advance is valid, but he cannot himself actively dispute it (on the principle *potior est conditio defendentis* of which afterwards) nor can his trustee in bankruptcy, who for this purpose is in no better position than himself, as there is in any case no offence against the bankruptcy laws."

An agreement by an accused person with his bail to indemnify him against liability on his recognizances is illegal, as depriving the public of the security of the bail," and so is the like agreement of a third person."

The compounding of offences under penal statutes is expressly forbidden by the Criminal Procedure Act 1876 (18 Eliz. c. 5), s. 5.

An election petition though not a criminal proceeding, is a proceeding of a public character and interest which may have penal consequences, and an agreement for pecuniary consideration not to proceed with an election petition is void at common law, as its effect would be to deprive the public of the benefit which would result from the investigation."

In like manner an agreement for the collusive conduct of a divorce suit is void," and agreements not to expose immoral conduct," and to conduct criminal proceedings against a third person in such a way that the name of a party who was in fact involved in the transaction should not be mentioned," have been held void.

¹⁰⁰ *Kaufman v. Gerson* [1903] 1 K. B. 391, 73 L. J. K. B. 320 C. A. See 1 Q. R. N. 227, and p. 350.

¹⁰¹ *Jones v. Meronethshire Building Society* [1892] 1 Ch. 173, 61 L. J. Ch. 138 C. A.

¹⁰² Otherwise where, after an act of bankruptcy, the bankrupt's money has been paid, stifling a prosecution, there the trustee can recover it. *Ex parte Wolverhampton Banking Co.* (1884) 14 Q. B. D. 32. *Ex parte Caldwell* 1876 4 Ch. Div. 150, 46 L. J. Bk. 13.

¹⁰³ *Herman v. Teuchner* 1885 15 Q. B. Div. 561, 54 L. J. Q. B. 340. It is an indictable conspiracy. *R. v. Porter* [1910] 1 K. B. 369, 79 L. J. K. B. 241.

¹⁰⁴ *Consolidated Exploration and Finance Co. v. Musgrave* [1900] 1 Ch. 37, 69 L. J. Ch. 1.

¹⁰⁵ *Coppock v. Rowser* (1898) 4 M. & W. 361, 51 R. R. 627.

¹⁰⁶ *Hope v. Hope* (1857) 8 D. M. & G. 731, 26 L. J. Ch. 417, 114 R. R. 306.

¹⁰⁷ *Brown v. Brine* (1875) 1 Ex. D. 5, 45 L. J. Ex. 129. But the authority of this decision appears doubtful, the reasons given are neither concordant nor convincing. Certainly there is not any general duty, civil or moral, to disclose immoral conduct which is not a criminal offence, in fact Kelly C.B. thought that in this case it would have been wrong. [*Brown v. Brine* was, however, apparently regarded as correct by Slesser L. J. in *Howard v. Odham's Press, Ltd.* [1938] 1 K. B. 1, 31; 106 L. J. K. B. 775; but his decision did not rest upon that ground.]

¹⁰⁸ *Lound v. Grimwood* (1888) 39 Ch. D. 605; 57 L. J. Ch. 795.

as against public policy. [So, too, is an agreement between A. and B. to keep secret a fraud which B. has committed against A., where such secrecy will prevent A. from giving information to third parties, which might assist them in securing the conviction of persons who had defrauded them in the past or in preventing the commission of frauds against them in the future.²³] There is nothing illegal in an agreement between parties in a probate action that costs shall come out of the estate whether the Court so order or not; and a party who makes such an agreement jointly with an infant may be personally liable on it if, by the Court not sanctioning the agreement on the infant's part, it cannot be specifically performed.²⁴

A shareholder in a company which was in course of compulsory winding-up agreed with other shareholders, who were also creditors, in consideration of being indemnified by them against all future calls on his shares, that he would help them to get an expected call postponed and also support their claim; it was held that "such an agreement amounts to an interference with the course of public justice", for the clear intention of the Winding-up Acts is that the proceedings should be taken with reasonable speed so that the company's affairs may be settled and the shareholders relieved; and therefore any secret agreement to delay proceedings to the prejudice of the other shareholders and creditors is void.²⁵ This comes near to the cases of secret agreements with particular creditors in bankruptcy or composition: and those cases do in fact rest partly on this ground. But the direct fraud on the other creditors is the chief element in them, and we have therefore spoken of them under an earlier head (pp. 258-260).

ousting the jurisdiction—arbitration

Agreements to refer disputes to arbitration are or rather were, to a certain extent regarded as encroachments on the proper authority of courts of justice by the substituting of a "domestic forum" of the parties' own making. At common law such an agreement, though so far valid that an action can be maintained for a breach of it,²⁶ does not "oust the ordinary jurisdiction of the Court"—that is, cannot be set as a bar to an action brought in the ordinary way to determine the very dispute which it was agreed to refer. Nor could such an agreement be specifically enforced,²⁷ or used as a bar to a suit in equity.²⁸ It is said however "that a

²³ [*Howard v. Odham Press, Ltd.* [1938] 1 K. B. 1, 106 L. J. K. B. 675.]

²⁴ *Prince v. Haworth* [1901] 2 K. B. 768; 75 L. J. K. B. 92. [So, too, an agreement between parties to an arbitration that the successful party shall have costs on the High Court scale is lawful: *Mansfield v. Robinson* [1928] 2 K. B. 353; 97 L. J. K. B. 466.]

²⁵ *Elliott v. Richardson* (1870) 1 R. 5 C. P. 744, 748-9, per Willes J.; 39 L. J. C. P. 340

²⁶ *Livingston v. Ralli* (1885) 5 E. & B. 132, 24 L. J. Q. B. 269; 103 R. R. 406

²⁷ *Street v. Rigby* (1802) 6 Ves. 815, 818

²⁸ *Cooke v. Cooke* (1867) L. R. 4 Eq. 77, 80-7, 30 L. J. Ch. 480. Therefore an award made pending an action and without previous application to the Court under the Arbitration Act is no bar. *Doleman v. Ossett Corp.* [1912] 3 K. B. 257; 81 L. J. K. B. 1092, C. A.

special covenant not to sue *may* make a difference."¹ And the law has not been directly altered;² but the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), now superseded by the Arbitration Act, 1889 (52 & 53 Vict. c. 49) [as amended by the Arbitration Act, 1934 (24 & 25 Geo. V. c. 14).] gave the Courts a discretion to stay proceedings in actions or suits on the subject matter of an agreement to refer which amounts in practice to enabling them to enforce the agreement and this discretion has as a rule been exercised by Courts both of law and of equity³ in the absence of special circumstances such as a case where a charge of fraud is made and the party charged with it desires the inquiry to be public,⁴ or where the defendant appeals to an arbitration clause not in good faith but merely for the sake of vexation or delay or is otherwise not really ready and willing to arbitrate.⁵ A question whether on the true construction of an arbitration clause the subject matter of a particular dispute falls within it is itself to be dealt with by the arbitrator if it appears from the nature of the case and the terms of the provisions for arbitration that such was the intention of the parties. Otherwise it must be decided by the Court.⁶ A clause purporting to disble the parties from requiring a special case to be stated for the opinion of the Court is provided by the Act is bad as an attempted encroachment on the jurisdiction of the Court.⁷

[In *Heyman v. Davyros Ltd.* the House of Lords has recently emphasized the necessity of construing each arbitration clause on its merits in order to determine whether it covers a particular dispute. It may be so drawn as to be still operative even when one party A has committed a breach of the contract so vital as to entitle the other party B to regard himself as no longer bound by the contract and B actually does take this course. This will

¹ See page 213.

² [The effect of these amendments is summarized in Russell's Arbitration, 13th ed. 32.

³ *Randegger v. Hoare*, 1880, 1 L. R. 14 P. 679; *Whymann v. Le Boulanger*, 1886, 15 Q. B. 68.

⁴ *Willeford v. Watson* (1873) 1 L. R. 14 Eq. 572; 13 Ch. 475; 42 L. J. Ch. 447; *Pleus Baker* (1873) 1 L. R. 16 Eq. 354; 43 L. J. Ch. 212. As to reference to the decision of a foreign Court see *Air Lines Co. v. Arabian* [1900] 1 Ch. 413; 78 L. J. Ch. 117.

⁵ *Russell v. Russell* (1886) 14 Ch. D. at 476; *Jessel M.R.* [See now the Arbitration Act 1934 s. 14 (2).]

⁶ 1 L. R. 14 Eq. 578; *Wills v. Corcoran* (1871) 1 L. R. 8 Ch. 476; 40 L. R. 16 Eq. 571.

The enactment applies only where there is at the time of action brought an existing agreement for reference which can be carried into effect. *Randell Saunders & Co. v. Thompson* (1875) 1 Q. B. Div. 748; 45 L. J. Q. B. 714. Not where the arbitration clause does not cover the whole subject-matter. *Turnock v. Sartori* (1889) 43 Ch. Div. 150; 62 L. J. 209. Nor when the matter in difference is a question of pure law. *Clegg v. Clegg* (1890) 44 Ch. Div. 200; 59 L. J. Ch. 520.

⁷ See the principle and limits of the exception explained in the *C. A. Parry v. Liverpool Malt Co.* [1900] 1 Q. B. 339; 69 L. J. Q. B. 161.

⁸ *Parry v. Young* (1879) 14 Ch. Div. 200, 208, per *Jessel M.R.* qualifying the apparent effect of *Willeford v. Watson* (1873) 1 L. R. 8 Ch. 473. We do not here pursue questions of detail as to an arbitrator's authority.

⁹ *Leamington v. Roth Schmidt & Co.* [1922] 2 K. B. 478; 92 L. J. K. B. 81; C. A. "There must be no Alastia where the King's writ does not run" per *Scrutton L.J.*

¹⁰ [1942] A. C. 356; 111 L. J. K. B. 241.]

¹¹ [Or, as it is commonly said, B. accepts A's repudiation as such, but the H. L. criticised the looseness of the word "repudiation."]

what happened in *Heyman's Case*. Moreover, the House did not agree with *dicta* in earlier decisions^{11a} which indicated that where further performance of the contract is prevented by frustration, an arbitration clause is *ex terminis* invalidated by the frustration. On the other hand, if the dispute is whether the contract were vitiated *ab initio* by mistake, fraud, illegality or the like, the arbitration clause is usually not wide enough to include such a dispute, but once again it depends on the terms in which it is expressed^{11b}.

Certain statutory provisions for the reference to arbitration of internal disputes in friendly and building societies have been decided (after some conflict) to be compulsory and to exclude the ordinary jurisdiction of the Courts. The Railway Companies Arbitration Act 1859 (22 & 23 Vict. c. 59), is also compulsory¹².

Moreover parties may if they choose make arbitration a condition precedent to any right arising at all, and in that case the foregoing rules are inapplicable. As where the contract is to pay such an amount as shall be determined by arbitration or found due by the certificate of a particular person.¹³ Whether this is in fact the contract or it is an absolute contract to pay in the first instance, with a collateral provision for reference in case of difference as to the amount is a question of construction on which there have been more or less conflicting opinions.

The same principle is applied where the rules of a race¹⁴ or of a sweepstake on a race appoint stewards to decide who is the

[Especially the Judicial Committee in *Hwy. Mutuals (Cheong) Ltd v. Co. Ltd* [1926] A.C. 397, 131 J.P.C. 121.]

[1942] A.C. 396, 71 T.L.R. 384, 398.]

Wright v. Mutual Investment Building Society [1917] 1 Ch. 101, 41 T.L.R. 640, *Hack v. Leamington Building Society* [1918] 1 Div. 103, 11 T.L.R. 54, *Municipal Building Society v. Kent* [1884] 9 App. Cas. 200, 33 L.J.Q.B. 200. *Bache v. Bullerham* [1914] 1 Q.B. 107, 63 L.J.M.C. 1 C.A. an improper award, otherwise with title Act cannot be treated as a mere nullity. Not so where the real question is whether a party claiming against the society is a member of the society at all. *Trenth v. Tord* [1871] 1 R. 10 P.C. 679, 41 L.J.C.P. 323. See the Building Societies Act 1934, 47 & 48 Vict. c. 41, and *W. T. N. Suburban & Co. v. Martin* [1937] 1 Q.B. Div. 60, 11 T.L.R. 38. *Watford and Rickmansworth Ry. Co. v. L. & N. Ry. Co.* [1869] L.R. 3 Iq. 231, 38 L.J.Ch. 449. Similar questions may arise under special and private Acts. *Joseph Crossfield & Son v. Manchester Ship Canal Co.* [1904] 2 Ch. 1, 73 L.J.Ch. 345, C.A.

^{11a} *Scott v. Avery* [1861] 11 L.J. 303, 101 R.R. 392 which does not overrule the former general law on the subject, see the judgments of Brett J. and Kelly C.B. in Ex. Ch. in *Edwards v. Stanion & Co. Society* [1875-6] 1 Q.B.D. 563, *Scott v. Corporation of Liverpool* [1878] 12 C. & J. 334, 28 L.J.Ch. 296, and see per Scrutton J. [1922] 2 K.B. at 489, *Cp. Collins v. Locke* (1879) (J.C.) 4 App. Cas. 674, 680, 48 L.J.P.C. 68. But a clause of this kind cannot be relied on along with a defence going to the root of the contract. *Jureidini v. National Millers' Insure Co.* [1915] A.C. 499, 84 L.J.K.B. 610. In a case falling under *Scott v. Avery* the Statute of Limitation runs only from the date of the award. *Cayzer, Irvine & Co. v. Board of Trade* [1927] 1 K.B. 269, C.A. affirmed [1927] A.C. 610, 96 L.J.K.B. 872.

^{11b} *Elliott v. Royal Exchange Assurance Co.* (1867) 1 R. 2 Lx. 237, 36 L.J. Ex. 129, *Dawson v. Fulzeard* 1876 1 Lx. Div. 257 reversing s.c. L.R. 9 Ex. 7, 45 L.J. Ex. 803.

¹² *Braun v. Overbury* (1856) 11 Lx. 713, 25 L.J. Lx. 169, 105 R.R. 743, decided shortly before and approved in *Scott v. Avery*.

¹³ *Cipriani v. Burnett* [1933] A.C. 83, 102 L.J.P.C. 118, where it was contended that the drawing of tickets had not been regularly conducted (appeal from Trinidad) the lottery was lawful under a local Ordinance.

winner, or declare that in the event of any dispute as to drawing of numbers or awarding of prizes then decision shall be final. Such questions must be conclusively determined by the persons expressly appointed to decide them.

MAINTENANCE AND CHAMPERTY *

We now come to a class of transactions which are specially discouraged as tending to pervert the due course of justice in civil suits."

These are the dealings which are held void as amounting to or being in the nature of champerty or maintenance. The principle of the law on this head has been defined to be "that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. Maintenance is said to be a general term of which champerty is a species, but this appears to be a recent notion. The main object of the old law was rather to put down the mischief of speculating in doubtful titles for which practice the complicated rules as to disclaim and its results offered much temptation. The most usual meanings (together with certain additions and distinctions now obsolete) are thus given by Coke:

First, to maintain to have part of the land or anything out of the land or part of the debt or any other thing in plea or suit, and this is called *an bipartita champertio* or *ex parte partitio* champerty.

The second is, when one maintaineth the one side without having any part of the thing in plea or suit. Champerty may accordingly be described in modern practice as "maintenance aggravated by an agreement to have a part of the thing in dispute."

Agreements falling distinctly within these descriptions are punishable under certain statutes. * It has always been considered, however, that champerty and maintenance are offences at common law, and that the statutes only declare the common law with additional penalties.

Whether by way of abundant caution or for other reasons, the

¹¹ [The law and its history are fully considered in Winfield, *Present Law of Abuse of Legal Procedure and Bodkin Maintenance and Champerty*.]

¹² It is extremely difficult to say how much of the voluminous authority on this topic is still of any practical importance, but it would be rash to dismiss it as obsolete.

¹³ By Lord Abinger in *Prasser v. Edmonds* (1895) 1 Y. & C. 481, 497, 41 R. R. 322, 331.

¹⁴ See Winfield, *The History of Maintenance and Champerty*, L. Q. R. xxxv, 50 [now incorporated in Winfield, *Present Law of Abuse of Legal Procedure*].

¹⁵ Co. Lit. 768 b. Every champerty is maintenance. 2 Ro. Ab. 119 R.

¹⁶ *Bovill* *et al.* in *Sprey v. Porter* (1846) 7 E. & B. 581, 26 L. J. Q. B. 61.

¹⁷ 3 Ed. 1 (Stat. Westm. 1), c. 25, 13 Ed. 1 (Stat. Westm. 2), c. 49, 28 Ed. 1 (Stat. 11), Stat. de Conspiratoribus, temp. incert., 20 Ed. 3, c. 4, 1 Ric. 2, c. 4, 7 Ric. 2, c. 15, and 32 H. 8, c. 9, of which more presently.

¹⁸ *Pachell v. Watson* (1841) 8 M. & W. 691, 700, 13 R. R. 843, 850, 2 Ro. Ab. 114 D. [Cf. Winfield, *op. cit.* 113.]

law was in early times applied or at any rate asserted with extreme and almost absurd severity.²⁶ It was even contended that the absolute beneficial assignment of a contract was bad for maintenance.²⁷ The modern cases proceed, not upon the letter of the statutes or of the definitions given by early writers, but upon the real object and policy of the law which is to repress that which Knight Bruce L. J. spoke of as 'the traffic of merchandising in quarrels, of huckstering in litigious discord,' which decent people hardly require legal knowledge to warn them from, and which makes the business and profit of breedbates, barristers, or counsel whom no Inn will own, and solicitors estranged from every roll."²⁸ On the other hand the Courts have not deemed themselves bound to permit things clearly within the mischief aimed at any more than to forbid things clearly without it. They have in fact taken advantage of the doctrine that the statutes are only in affirmance of the common law to treat them as giving indications rather than definitions, as bearing witness to the general policy of the law but not exhausting or restricting it. It is not considered necessary to decide that a particular transaction amounts to the actual offence of champerty or maintenance in order to disallow it as a ground of civil rights: it will be void as savouring of maintenance if it clearly tends to the same kind of mischief.

A considerable number of defences to maintenance and champerty have been recognized at one time or another in our law.²⁹ Exactly how some of these would be treated at the present day must be a matter of speculation. Thus kinship with the person maintained was held to be a defence to some extent. It is submitted that nowadays the Courts would probably investigate such a defence much more closely than accept the bare proof of relationship as sufficient in itself to justify the interference.³⁰

Of maintenance pure and simple an important head in the old books, there are few modern examples: almost all the decisions illustrate the more special rule against champerty, namely that a bargain whereby the one party is to assist the other in recovering property and is to share in the proceeds of the action is illegal.³¹ On this head the rules now established appear to be as follows:

(1) An agreement to advance funds or supply evidence with or without professional assistance or indeed professional assistance

²⁶ See Baron's Abridgment, Maintenance, A. 50.

²⁷ [Lampet's case, 1613, 10 Rep. 46 b, 48 a.]

²⁸ *Reynell v. Sprye*, 1852, 1 D. M. & G. 416, 689, 61 R. R. 245, 249.

²⁹ [They are collected in Wintfield, *op. cit.* 21, 35.]

³⁰ [Ib. 28, 31.]

³¹ [The most important modern decision is *Acutt v. London Express Newspaper Ltd.* (1914) A. C. 368, 181 I. J. K. B. 28, where the earlier cases were cited or considered.]

³² Per Blackburn J. *Hutley v. Hutley*, 1875, 1 R. 8 Q. B. 112. Champerty is apt to be complicated with undue influence: see *Reynell v. Sprye*, note ²⁸ and *James v. Kerr* (1889) 40 Ch. D. 449.

only," for the recovery of property in consideration of a remuneration contingent on success and proportional to or to be paid out of the property recovered is void."

(ii) A solicitor cannot purchase the subject matter of a pending suit from his client in that suit—but he may take a security upon it for advances already made and costs already due in the suit.*

(iii) Except in the case last mentioned the purchase of property the title to which is disputed, or which is the subject of a pending suit or an agreement for such purchase is not in itself unlawful—but such an agreement is unlawful and void if the real object of it is only to enable the purchaser to maintain the suit.*

We proceed to deal shortly with these propositions in order.

1. COMMISSION ON RECOVERY OF PROPERTY

This rule was laid down by Lindal C. J. in *Stanley v. Jones* which seems to be the first of the modern cases at law.

"A bargain by a man who has evidence in his own possession respecting a matter in dispute between third persons and who at the same time professes to have the means of procuring more evidence to purchase from one of the contending parties at the price of the evidence which he so possesses or can procure a share of the sum of money which shall be recovered by means of the production of that very evidence cannot be enforced in a Court of law."

It is quite immaterial for this purpose whether any litigation is already pending or not although the offence of maintenance is properly maintaining an existing suit not procuring one which commenced." It is obvious that the mischief is even greater in the case where a person is instigated by the promise of indemnity in the event of failure to undertake litigation which otherwise he would have not thought of. If a person who is in actual possession of certain definite evidences of title proposes to deliver them to a person whose title they support on the terms of having

Per JAMES M.R. *Re Hunter and Solicitor* 4 L. 187, 1 Ch. D. 73, 34 L. J. Ch. 4, where the agreement was to pay the solicitors in the event of success a percentage of the property recovered. But probably the real meaning, it was that the solicitor should find the funds. *Re Solicitor* [1912] 1 K. B. 312, 312 L. J. K. B. 24 removes any doubt. Cf. *Gree v. Lee* 1824 10 C. B. N. S. 73 and *Stranger v. Brown* 1846 cited p. 309.

* *Stanley v. Jones* 1841 7 Bing. 69, 11 R. R. 115, *Reynold's Spire* 1852 1 D. M. C. 120, 21 L. J. Ch. 63, 11 R. R. 229, *Spence v. Porter* 1852 1 F. & B. 13, 21 L. J. Q. B. 64, 110 R. R. 391, *Hulley v. Hulley* 1871 1 F. R. B. Q. B. 112, 1 L. J. Q. B. 1, *Wood v. Doune* 1811 18 Ves. 120, 11 R. R. 160, *Simpson v. Lamb* 1811 1 F. & B. 26, 1 L. J. Q. B. 121, 110 R. R. 307.

* *Anderson v. Radcliffe* 1860 Ex. Ch. 1 F. & F. 319, 29 L. J. Q. B. 128, 11 R. B. 18.

Hunter v. Daniel 1845 3 Ha. 320, 67 R. R. 113, *Knight v. Bourne* 1858 2 D. C. & J. 421, 44 L. J. Ch. 521.

* *Prosser v. Edmunds* 1835 1 Y. & C. Ex. 19, 481, 41 R. R. 322, *Harrington v. Lor* 1833-4 2 M. & K. 500, 39 R. R. 304, *De Hognlon v. Money* (1866) 1 L. R. 2 Ch. 164, *Seaton v. Lauson* 1880 15 Ch. D. 426, 49 L. J. Bk. 69, where the precise extent of the doctrine is treated as doubtful. *Guy v. Churchill* 1888 40 Ch. D. 481, 58 L. J. Ch. 345.

* (1891) 7 Bing. 369, 377, 33 R. R. 513, 520.

* [Cf. *Winfield*, op. cit. 114, 115.]

certain share of any property that may be recovered by means of these evidences, there being no suit depending, and no stipulation for the commencement of any, this is not unlawful; for litigation is not necessarily contemplated at all and in any case there is no provision for maintaining any litigation there may be.⁴¹ But it is in vain to put the agreement in such a form if these terms are only colourable,⁴² and the real agreement is to supply evidence generally for the maintenance of an intended suit: the illegal intention may be shown, and the transaction will be held void.⁴³ Still less can the law be evaded by slighter variations in the form or manner of the transaction—for instance an agreement between solicitor and client that the solicitor shall advance funds for carrying on a suit to recover possession of an estate, and in the event of success shall receive a sum above his regular costs according to the interest and benefit acquired by the possession of the estate, is as much void as a bargain for a specific part of the property.⁴⁴ So where a solicitor was to have a percentage of the fund recovered in a suit it was held to be not the less champerty because he was not himself (and in fact could not be) the solicitor in the suit but employed another.⁴⁵ A solicitor cannot refuse to account to his client and submit to taxation of costs on the ground that the business for which he was retained involved champerty or maintenance.⁴⁶

An agreement by a solicitor with a client simply to charge nothing for costs in a particular action is not champerty.⁴⁷

2. PURCHASE OF THING IN LITIGATION BY SOLICITOR

This rule came to be laid down in a somewhat curious way. In *Wood v. Downes*⁴⁸ Lord Eldon set aside a purchase by a solicitor from his client of the *res litigiosa*, partly on the ground of maintenance. But it is to be noted as to this ground that the agreement for sale was in substitution for a previous agreement which clearly amounted, and which the parties had discovered to amount, to maintenance—and the Court appears to have inferred as a fact that it was all one illegal transaction and the sale merely colourable.⁴⁹

⁴¹ *Sprye v. Porter* 1856 7 L. & B. 561 J. Q. B. 64 110 R. R. 493.

⁴² As a matter of fact, it is difficult to suppose that they could ever be otherwise.

⁴³ *Sprye v. Porter* 1856 7 L. & B. 561 J. Q. B. 64 110 R. R. 493, cp. *Ries v. De Bernardy* [1866] 2 Ch. 437 65 L. J. Ch. 636 where there was a deliberate endeavour to conceal the real intention.

⁴⁴ *Earle v. Hopwood* 1861 9 C. B. N. S. 366 30 L. J. C. P. 217 [See too *Higgin v. Luty* 11928] 55 L. J. R. 7-1].

⁴⁵ *Strange v. Brennan* 1836 15 Sim. 336 2 C. P. Cooper temp. Cottenham, 1, 1, 1 J. Ch. 980 74 R. R. 94. The agreement was made with a solicitor in Ireland not being a solicitor of the English Court of Chancery, and the fund to be recovered was in England.

⁴⁶ *Tennings v. Johnson* 1873 L. R. 8 C. P. 425 [(*Clare v. Joseph* [1907] 2 K. B. 960 372, 378, (*Gandy v. Sansbury* [1910] 1 K. B. 99 104)].

⁴⁷ 1811 18 Ves. 120, 11 R. R. 160.

⁴⁸ Cp. *Sprye v. Porter*, *supra*. In *Wood v. Downes* the parties do not seem to have even kept the original and real agreement off the face of the transaction in its ultimate shape. See 18 Ves. 123, 11 R. R. 162. It is to be regretted that the reporter did not preserve the full statement of the facts, 18 Ves. 122) with which the judgment opened.

The other ground, which alone would have been enough, was the presumption of undue influence in such a transaction, arising from the fiduciary relation of solicitor and client (of which we shall speak in a subsequent chapter). The Court of Queen's Bench, however, in *Simpson v. Lamb*⁴⁹ followed *Wood v. Downes*, as having laid down as a matter of the "policy of the law" the positive rule above stated. In *Anderson v. Radcliffe*,⁵⁰ unanimous judgments in both the Q. B. and the Ex. Ch. added the qualification that a conveyance by way of security for past expenses is nevertheless good. The Court of Exchequer Chamber showed a decided opinion that *Simpson v. Lamb* had gone too far, but without positively disapproving it. In *Knight v. Bowyer*, again, Turner L.J. said: "I am aware of no rule of law which prevents an attorney from purchasing what anybody else is at liberty to purchase, subject, of course, if he purchases from a client, to the consequences of that relation."⁵¹ But the case before the Court was not the purchase by a solicitor from his client of the subject-matter of a suit in which he was solicitor: *Simpson v. Lamb*, therefore, was only treated as distinguishable.⁵² The case must be considered a subsisting authority, but anomalous, and not likely to be at all extended.

3. PURCHASE OF THINGS IN LITIGATION IN GENERAL

The authorities cannot all be reconciled in detail; but the distinction which runs through them all is to this effect. The question in every case is whether the real object be to acquire an interest in property for the purchaser, or merely to speculate in litigation on the account either of the vendor and purchaser jointly or of the purchaser alone. It is not unlawful to purchase an interest merely for the purpose of litigation. In other words, the sale of an interest to which a right to sue is incident is good; but the sale of a mere right to sue is bad.⁵³ A claim to compensation under s. 68 of the Lands Clauses Consolidation Act, 1845 (8 and 9 Vict. c. 18), is not a mere right of litigation but an assignable interest in property.⁵⁴

A man who has conveyed property by a deed voidable in equity

⁴⁹ (1857) 7 E. & B. 84; 26 L. J. Q. B. 121; 110 R. R. 507.

⁵⁰ (1858) E. B. & E. 806; 28 L. J. Q. B. 32; 29 *ib.* 128; 113 R. R. 809.

⁵¹ (1858) 2 De G. & J. at 445.

⁵² *Dickinson v. Burrell* (1866) L. R. 1 Eq. 337, 342; 35 L. J. Ch. 371; and see per Parker J. (sitting in C. A.) *Glegg v. Bromley* [1912] 3 K. B. at 490; 81 L. J. K. B. 1081.

⁵³ *Id.*; *Prosser v. Edmonds* (1835) 1 Y. & C. Ex. 481; 41 R. R. 322. Dist. *Guy v. Churchill* (1888) 40 Ch. D. 481; 56 L. J. Ch. 670; bankrupt's right of action assigned by the trustee to one creditor (in fact acting for himself and others), who was to keep three-fourths of the proceeds: held justifiable as a beneficial arrangement for the creditors.

⁵⁴ *Dawson v. G. N. & City Ry.* [1905] 1 K. B. 260, 271; 74 L. J. K. B. 190, C. A. So the assignment of a right to sue on a covenant incident to an existing interest of the assignee's is harmless: *Ellis v. Torrington* [1900] 1 K. B. 399; 89 L. J. K. B. 369, C. A. [See, too, *County Hotel & Wine Co., Ltd. v. L. & N. W. Ry.* [1918] 2 K. B. 251; 87 L. J. K. B. 800.]

retains an interest not only transmissible by descent or devise, but disposable *inter vivos*, without such disposition being champerty. But "the right to complain of a fraud is not a marketable commodity," and an agreement whose real object is the acquisition of such a right cannot be enforced. In like manner, a creditor or a company may well assign his debt but he cannot sell as incident to it the right to proceed with a winding up petition."

The payment of the price being made contingent on the recovery of the property is probably under any circumstances a sufficient, but is by no means a necessary condition of the Court being satisfied that the real object is to traffic in litigation. If the purchase is made while a suit is actually pending the circumstance of the purchaser indemnifying the vendor against costs may be material but is not alone enough to show that the bargain is in truth for maintenance.* But the only view which on the whole seems tenable is that it is a question of the real intention to be collected from the facts of each case for arriving at which few or no positive rules can be laid down.

There is no champerty in an agreement to enable the *bona fide* purchaser of an estate to recover for rent due or injuries done to it previously to the purchase.

It has been decided in several modern cases that the purchase of shares in a company for the purpose of instituting a suit at one's own risk to restrain the governing body of the company from acts unwarranted by its constitution cannot be impeached as savouring of maintenance.* It is not maintenance to take an assignment of undisputed debts on the terms that the assignee shall realise them and pay over the proceeds less cost to the respective assignors." It was said as long ago as 21 Ed. III. that a purchase of property pending a suit affecting the title to it is not of itself champerty.

If pending a real action a stranger purchases the land of tenant in fee for good consideration and not to maintain the plea, this is no champerty.* (But the point cannot be regarded as settled until Coke's time*.)

* *Prosser v. Edmunds*, *supra*. *De Hightm v. Money*, 1906, 1 R. 2 Ch. 164, 169. Cp. *Hill v. Boyle* (1807) 1 R. 414, 460, and *q.v.* whether the right to cut down an absolute conveyance to a mortgage be saleable. *Seear v. Lawson* (1880) 15 Ch. Div. 426, 49 L. J. Bk. 64. [For the extent to which a right of action in tort is assignable, see Winfield, *Present Law of Abuse of Process*, lxxv. 67-69.]

* *Re Paris Skating Rink* (1877) 5 Ch. Div. 159.

* *Harrington v. Long* (1833-34) 2 M. & K. 590, 14 R. R. 304, as corrected by *Knight v. Bowyer*, note 41, p. 308, and see *Hunter v. Daniel* (1845) 4 Ha. at 430, 67 R. R. 121, 122. But the true ground of the case seems the same as in *Prosser v. Edmunds* and *De Hightm v. Money*, namely, that the real object was to give the purchaser a *locus standi* to set aside a deed for fraud.

* *Per Cur.* (Ex. Ch.) *Williams v. Protheroe* (1829), Bing. 309, 314, 30 R. R. 608, 613.

* See *Bloxham v. Metrop. Ry.* (1868) L. R. 3 Ch. at 353.

* *Fitzroy v. Cave* [1905] 2 K. B. 304, 74 L. J. K. B. 829, C. A. The assignee's ulterior motives are immaterial.

* 2 Ro. Ab. 113 B., 1 B. 21 L. III. 10, pl. 3, [cited as 52 in Rolle], but [no decision is reported in this case and] in 50 Ass. 323, pl. 3, the general opinion of the Serjeants is *contra*. Cp. 4 Kent, Comm. 449. [Other early authorities are equally inconclusive. Winfield, *op. cit.* 13-14.]

* [2 Inst. 484.]

STATUTE OF HEN. VIII

The statute of 1540, 32 Hen. VIII. c. 9, "Against maintenance and embracery, buying of titles, &c." after reciting the mischiefs of "maintenance embracery champerty subornation of witnesses sinister labour buying of titles and pretended rights of persons not being in possession," and confirming all existing statutes against maintenance, enacts that:

"No person or persons, of what estate degree or conditions so ever he or they shall be, shall from henceforth bargain buy or sell, or by any ways or means obtain get or have, any pretended rights or titles, or take promise grant or covenant to have any right or right of any person or persons in or to any manors land tenements or hereditaments, but if such person or persons which shall so bargain sell give grant covenant or promise the same their antecessors or they by whom he or they claim the same have been in possession of the same or of the reversion or remainder thereof, or taken the rents or profits thereof by the space of one whole year next before the said bargain covenant grant or promise made."

The penalty is forfeiture of the whole value of the lands (s. 2), saving the right of persons in lawful possession to buy in adverse claims (s. 4). There is no express saving of grants or leases by persons in actual possession who have been so for less than a year: but either the condition as to time applies only to receipt of rent or profits without actual possession, or at all events the intention not to touch the acts of owners in possession is obvious.⁶¹

This, like the other statutes against maintenance and champerty, is said to be in affirmance of the common law.⁶² It "is formed on the view that possession should remain undisturbed. Dealings with property by a person out of possession tend to disturb the actual possession to the injury of the public at large."⁶³ It is immaterial whether the vendor out of possession has in truth a good title or not.⁶⁴ An agreement between two persons out of possession of lands, and both claiming title in them, to recover and share the lands, is contrary to the policy of this statute, if not champerty at common law: therefore where co-plaintiffs had in fact conflicting interests, and it was sought to avoid the resulting difficulty as to the frame of the suit by stating an agreement to divide the property in suit between them, this device (which now would in any case be disallowed on more general grounds)⁶⁵

⁶¹ By *Montague C. J.* *Partridge v. Strange* (1552), Plowd. 88, cited in *Doe d. Williams v. Evans* (1845) 1 C. B. 717; 14 L. J. C. P. 237; 68 R. R. 807, 811, 813. See further *Jenkins v. Jones* (1882) 9 Q. B. Div. 128; 51 L. J. Q. B. 438, as to the meaning of "pretended rights" and the limited application of the statute at the present time. "A right or title which is grantable under the Law of Property Act, 1925, s. 4 (2), which replaces the Act of B & 9 Vict. c. 106, is not now "pretended" merely because the grantor has never been in possession. To enforce a forfeiture under the statute the plaintiff must show that the purchaser knew the title to be "pretended"; *Kennedy v. Lyell* (1885) 15 Q. B. D. 491; 53 L. T. 466.

⁶² See last note.

⁶³ Per Lord Redesdale, *Chalmers v. Clinton* (1821) 4 Bligh, at 75.

⁶⁴ See *Cooke v. Cooke* (1864) 4 D. J. S. 704; *Pryse v. Pryse* (1872) L. R. 15 Eq. 86; 42 L. J. Ch. 253.

was unavailing, for such an agreement had it really existed, would have been unlawful and would have subjected the parties to the penalties of the statute.*

Where after the death of a lessee a stranger had entered, and remained many years in possession a sale of the term by the administrator of the lessee was held void as contrary to the statute although in terms it only forbids sales of pretended rights, &c. under penalties without expressly making them void.⁶⁶ But the sale of a contingent right or a mere expectancy, not being in the nature of a claim adverse to any existing possession, is not forbidden. The sale of a man's possible interest as the devisee of a living owner on the terms that he shall return the purchase money if he does not become the devisee is not bad either at common law as creating an unlawful interest in the present owner's death or as a bargain for a pretended title under the statute.⁶⁷

Proceedings in lunacy seem not to be within the general rule as to champerty as they are not analogous to ordinary litigation and their object is the protection of the person and property of the lunatic which is in itself to be encouraged and this object would in many cases be impeded rather than promoted by holding that all agreements relative to the costs of the proceedings or the ultimate division of the property were void.

MAINTENANCE IN GENERAL

Maintenance in the strict and proper sense is understood to mean only the maintenance of an existing suit not procuring the commencement of a new one. But the distinction is in practice immaterial even in the criminal law. It is of more importance that a transaction cannot be void for champerty or maintenance unless it be something against good policy and justice something tending to promote unnecessary litigation something that in a legal sense is immoral and to the constitution of which a bar

* *Cholmondeley v Clinton* (1817) 4 Blac 114. See also *Edin and Lord Redesdale*

⁶⁶ *Doe v Williams* (1840) 11 C B 717. 11 L J Ch 7. 68 R R 807. Cf. above as to the construction of prohibited transactions, p. 26.

⁶⁷ *Cool v Field* (1850) 15 Q B 460. 15 L J Q B 442. 1 R R 690. By the civil law, however, such contracts are required for *certi eventus* *ut res pactiones ad omne videntur et plene transmittantur* *et periculosi eventus* *ut res in a rescript of Justinian on an agreement between expectant co-heirs as to the disposal of the inheritance. The rescript goes on quite in the spirit of our own statute, to forbid in general terms all dealings in alienis rebus contra dominum voluntatem* (C. 2 § de pact. 1). By the Civil Code of Naples art. 1600 (followed by the Italian Civil Code art. 1498) *On ne peut vendre la succession d'une personne vivante même de son consentement* (p. 107 art. 1130). In Roman law the rule that the inheritance of a living person could not be sold is put only on the technical ground *quia in rerum natura non sit quod veniret* (D. 11 § de hered. vel actione vendita 1. and see *col. tit. 11*).

⁶⁸ *Perre v Perre* (1840) 7 Cl & F 270. 11 R R 22, 29, per Lord Cottenham [*In re E. S.* (1876) 4 Ch D 301 while recognizing the desirability of freedom in commencing lunacy proceedings indicates its limits].

⁶⁹ See *Wood v Downes* (1811) 18 Ves. at 123. 11 R R 164.

motive in the same sense is necessary."⁷² Therefore, for example, a transaction cannot be bad for maintenance whose object is to enable a principal or other person really interested to assert his rights in his own name.⁷³ Nor is it maintenance for several persons to agree to prosecute or defend a suit in the result of which they have, or reasonably believe they have, a common interest.⁷⁴ But a bargain to have a share of property to be recovered in a suit in consideration of maintaining the suit by the supply of money and evidence is not saved from being champerty by the party's having a mere collateral interest in the result of the suit.⁷⁵ Where a person sues for a statutory penalty as a common informer, it is maintenance to indemnify him against costs.⁷⁶ The question of what constitutes a common interest in the eye of the law is a difficult one and cannot be pursued farther here.⁷⁷

Lineal kinship in the first degree or apparent heirship, and to a certain extent it seems, any degree of kindred or affinity, or the relation of master and servant, may justify acts which as between strangers would be maintenance, but blood relationship will not justify champerty.

(c) Public policy as to legal duties of individuals

Certain kinds of agreements are or have been considered unlawful and void as providing for or tending to the omission of duties which are indeed duties towards individuals but such that their performance is of public importance.

The conductors of a newspaper professing to give information on a certain class of business enterprise (or, it seems plainer, on financial schemes generally) are bound to give it honestly and impartially, therefore in agreement that such a journal shall refrain from comment on the business of a certain company within its chosen field is on this ground, as well as on that of restraint of trade, not enforceable. This is a remarkable and so far, we think

⁷² *Fischer v. Kauria Vazir* (1860) 8 Moo. Ind. App. 150, 187. This is not necessarily applicable in England, being said with reference to the law of British India, where the English laws against maintenance and champerty are not specifically in force; see *Ram Gopal (London) v. Chander Gopal Munderjee* (1870) 2 App. Cas. 186, 207, and the later judgment cited below. But it fairly represents the principle, which English judges have acted in the modern cases. The English law of champerty is not in force in India, and documents which set up agreements to share the subject of litigation if recovered, in consideration of supplying funds to carrying it on, are not in themselves opposed to public policy, but such documents should be jealously scanned, and, when found to be extortionate and unconscionable, they are inequitable as against the party against whom relief is sought, and effect should not be given to them. *Amar Ram Lal v. Ad Kan* (1893) L. R. 20 Ind. App. 112, 115.

⁷³ *Findon v. Parker* (1843) 11 M. & W. 675, 12 L. J. Ex. 444, 63 R. R. 723; *Plattin Co. v. Farquharson* (1881) 17 Ch. Div. 49, Cp. 2 Ro. Ab. 115 G.

⁷⁴ *Hutley v. Hutley* (1875) L. R. 8 Q. B. 112, 42 L. J. Q. B. 52. But the interest of a bankrupt's creditors is more than "collateral". *Guy v. Churchill* (1888) 5 Ch. D. 481; 56 L. J. Ch. 670.

⁷⁵ *Bradlaugh v. Newdegate* (1883) 11 Q. B. D. 1, 52 L. J. Q. B. 454.

⁷⁶ [The cases are examined in Winfield, *Present Law of Abuse of Procedure*, 69-84.]

⁷⁷ *Hutley v. Hutley*, *supra*. See 2 Ro. Ab. 115, 116. [Cf. Winfield, *op. cit.* 28-31, 33-29.]

unique judicial recognition of the public functions and duties of the press.⁷⁸

To this head must be referred the rule of law that a father cannot by contract deprive himself of the right to the custody of his children" or of his discretion as to their education. He "cannot bind himself conclusively by contract to exercise in all events in a particular way rights which the law gives him for the benefit of his children and not for his own." And an agreement to that effect—such as an agreement made before marriage between a husband and wife of different religions that boys shall be educated in the religion of the father, and girls in the religion of the mother—cannot be enforced as a contract.⁷⁹

After the father's death the Court has a certain discretion. The children are indeed to be brought up in his religion, unless it is distinctly shown by special circumstances that it would be contrary to the infant's benefit.⁸⁰ When such circumstances are in question however, the Court may inquire "whether the father has so acted that he ought to be held to have waived or abandoned his right to have his children educated in his own religion"; and in determining this the existence of such an agreement as above mentioned is material.⁸¹ The father's conduct in giving up the maintenance, control, or education of his children to others may not only leave the Court free to make after his death such provision as seems in itself best; it may preclude him even from asserting his rights in his lifetime.⁸²

Clauses in separation deeds or agreements for separation, purporting to bind the father to give up the general custody of his children or some of them, have for the like reasons been held void; and specific performance of an agreement to execute a separation deed containing such clauses has been refused.⁸³ In one case, however, such a contract can be enforced; namely, where there has been such misconduct on the father's part that the Court would have interfered to take the custody of the children from him in the exercise of the appropriate jurisdiction and on grounds independent of contract. The general rule is only that the custody of children cannot be made a mere matter of bargain, not that the

⁷⁸ *Neillie v. Dominion of Canada News Co.* [1915] 3 K. B. 556; 84 L. J. K. B. 2105, C. A. But there is nothing against public policy in an agreement by clients of a private agency inquiry not to disclose confidential information furnished by the agency: *Bradstreet, Ltd. v. Mitchell* [1933] Ch. 190; 102 L. J. Ch. 34.

⁷⁹ *Re Andrews* (1873) L. R. 8 Q. B. 153, *sub. nom. Re Edwards*, 42 L. J. Q. B. 99, and authorities there collected. [Giving an infant child in adoption is now permissible under the Adoption of Children Act, 1926 (16 & 17 Geo. 5, c. 29 and the Adoption of Children (Regulation) Act, 1939 (2 & 3 Geo. 6, c. 27).]

⁸⁰ *Andrews v. Salt* (1873) L. R. 8 Ch. 622, 636.

⁸¹ *Hawksworth v. Hawksworth* (1871) L. R. 6 Ch. 539; 40 L. J. Ch. 734.

⁸² *Andrews v. Salt* (1873) L. R. 8 Ch. at 637.

⁸³ *Lyons v. Blenkin* (1820-1) Jac. 245, 255, 263; 23 R. R. 38.

⁸⁴ *Vansittart v. Vansittart* (1858) 2 De G. & J. 249, 259; 27 L. J. Ch. 222. As to the validity of partial restrictions of the husband's right, *Hamilton v. Hector* (1871) L. R. 6 Ch. 701; L. R. 13 Eq. 511; 40 L. J. Ch. 692.

husband can in no circumstances bind himself not to set up his paternal rights."

The law on this point is now modified by the Act 46 & 47 Vict c 12 enacts (s. 2) that

"No agreement contained in any separation deed between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother. Provided always that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto."

This Act does not enable a father to delegate his general right and powers as regards his infant children. "That however it is possible under the Adoption of Children Act 1926 (16 & 17 Geo. 5 c. 29) and the Adoption of Children (Regulation) Act 1950 (2 & 3 Geo. 6 c. 27).

The mother of an illegitimate child has parental duties and rights recognized by the law and cannot deprive herself of them by contract."

The objections formerly entertained (as we have seen) first against separation deeds in general and afterwards down to quite recent times against giving full effect to them in courts of equity were based in part upon the same sort of grounds and so are the reasons for which agreements providing for a future separation have always been held invalid. For not the parties alone but society at large is interested in the observance of the duties incident to the marriage contract as a matter of public example and general welfare.

Considerations of the same kind enter into the policy of the law with respect to the sale of offices also spoken of above. Such transactions clearly involve the abandonment or evasion of strict legal duties.

On similar grounds again seamen's wages or any remuneration in lieu of such wages cannot be the subject of insurance at common law. The reason of this is said to be "that if the title to wages did not depend upon the earning of freight by the performance of the voyage seamen would want one great stimulus to exertion in times of difficulty and danger." This reason however is removed in England by the Merchant Shipping Act 1894 (57 & 58 Vict c 60 s. 157), which makes the right to wages independent of freight being earned. The question has not yet presented itself for decision whether the rule founded upon it is to be considered as removed also.

¹¹ *Swifley v. Swifley* (1865) 4 D. & F. J. 710, 714, 34 L. J. Ch. 400, 394 and see the remarks in L. R. 6 Ch. 70, L. R. 13 Eq. 520.

¹² *Re Berant* (1879) 11 Ch. Div. 508, 518, 48 L. J. Ch. 497.

¹³ *Barnardo v. McHugh* [1891] A. C. 388, 61 L. J. Q. B. 721.

¹⁴ *Humphreys v. Polak* [1901] 2 K. B. 385, 70 L. J. K. B. 752 C. A.

¹⁵ *Webster v. De Tastet* (1797) 7 F. R. 157, 4 R. R. 402.

¹⁶ *Kent, Comm.* 3, 269.

It has never been decided, but it seems highly probable, that agreements are void which directly tend to discourage the performance of social and moral duties. Such would be a covenant by landowner to let all his cultivable land lie waste, or a clause in a charter-party prohibiting deviation even to save life.⁹¹

(d) As to agreements unduly limiting the freedom of individual action.

There are certain points in which it is considered that the choice and free action of individuals should be as unfettered as possible. As a rule a man may bind himself to do or omit, or procure another to do or omit, anything which the law does not forbid to be done or left undone. The matters as to which this power is specially limited on grounds of general convenience are:—

1. Marriage.
2. Testamentary dispositions.
3. Trade.

1. MARRIAGE⁹²

Marriage is a thing in itself encouraged by the law; the marriage contract is moreover that which of all others should be the result of full and free consent. Certain agreements are therefore treated as against public policy either for tending to impede this freedom of consent and introduce unfit and extraneous motives into the contracting of particular marriages, or for tending to hinder marriage in general. The first class are the agreements to procure or negotiate marriages for reward, which are known as marriage brokerage contracts. All such agreements are void,⁹³ whether for the procurement of marriage with a specified person or of marriage generally,⁹⁴ and services rendered without request in procuring or forwarding a marriage (at all events a clandestine or improper one) are not merely *no* consideration, but an *illegal* consideration, for a subsequent promise of reward, which promise, even if under seal, is therefore void.⁹⁵ The law is said to be comparatively modern on this head: but it has already ceased to be of much practical importance.⁹⁶

We pass on to the second class, agreements "in restraint of

⁹¹ *Per Cockburn C.J.* 7 C. P. D. at 305. [According to the American Corpus Juris, "Contracts," vol. 13, 460, mere moral turpitude will not in itself invalidate a contract; the authorities cited are in note 43. I can find no consideration of the point raised by Pollock in either Williston, Contracts, or the Restatement of Contracts. —Ed.]

⁹² [For American law, see Williston, Contracts, § 1741.]

⁹³ E.g., *Cole v. Gibson* (1756) 1 Ves. Sr. 503. See story, Eq. Jur. §§ 260 *seq.*

⁹⁴ *Hermann v. Charlesworth* [1905] 2 K. B. 123; 71 L. J. K. B. 620, C. A. [But money paid to the broker for his endeavours to procure such a marriage is recoverable. This irregular exception to the general rule, that money paid in pursuance of an unlawful contract is irrecoverable when once the purpose is wholly or partially effected, is explicable on historical grounds: Salmond & Winfield, Contracts, 152--153.]

⁹⁵ *Williamson v. Gihon* (1805) 2 Sch. & L. 357.

⁹⁶ In the Roman law these contracts were good apart from special legislation: they were limited as to amount (though with an expression of general disapproval) by a constitution preserved only in a Greek epitome: C. 5. 1. de sponsalibus, &c. 6.

marriage" as they are called. An agreement by a bachelor or spinster not to marry at all is clearly void;" so, it seems would be a bare agreement not to marry within a particular time." In *Low v Peers*" a covenant not to marry any person other than the covenantee was held void. A promise to marry nobody but A. B. cannot be construed as a promise to marry A. B. and is thus a mere restraint of marriage and even if it could, it was thought doubtful whether an unilateral covenant to marry A. B. would be valid, A. B. not being bound by any reciprocal promise.¹ Lord Mansfield threw out the opinion (not without followers in our own time),² that even the ordinary contract by mutual promises of marriage is not free from mischievous consequences. The decision was affirmed in the Exchequer Chamber, where it was observed that

'Both ladies and gentlemen . . . frequently are induced to promise not to marry any other persons but the objects of their present passion and if the law should not rescind such engagements they would become prisoners for life at the will of most inexorable juries disappointed lovers.'

A covenant not to revoke a will is not void as being a covenant not to marry, though the party's subsequent marriage would revoke the will by operation of law. As a covenant not to revoke the will in any other way it is good,³ but the party's marriage gives no ground of action as for a breach (for marriage revokes the will by operation of law, whether the testator wishes it or not, it is a mode of revocation which takes place not by virtue of some action of the testator directed to the revocation of the will, but as a collateral consequence imposed by law of an action performed *alio intuitu*).⁴

In the absence of any known express decision it may be gathered from the analogy of the cases on conditions in restraint of marriage that a contract not to marry some particular person or any person of some particular class, would be good unless the real intention appeared to be to restrain marriage altogether, and that a contract by a widow or widower not to marry at all would probably be good.

¹ *Low v Peers* (1768) Wilmot, 364, 372, where it is said that it is a contract to do a "moral duty, and . . . tends to depopulation, the greatest of all political sins."

² *Hartley v Rye* 1808, 10 East, 22, 10 R. R. 228, a wager.

³ 1768, 4 Burr 2225, 33 Ex. Ch. Wilm. 364.

⁴ But of this *quæ* for a refusal by A. B. to marry on request within a reasonable time would surely discharge the promisor on general principles. Cf. *Cock v Richard* 1805, 10 Ves 429, 8 R. R. 23.

⁵ 4 Burr 2230, per Martin B. *Hall v Wright* 1858, L. R. 1, at 788, 29 L. J. Q. P. at 44, 113 R. R. 388.

⁶ Wilm. 378.

⁷ [E.g., covenant not to revoke the first will by making a second one, or by destroying the first.]

⁸ *Robinson v Osmann* 1883, 21 Ch. D. 780; 23 Ch. Div. 284, 52 L. J. Ch. 440.

⁹ [*Re Adairland* [1939] Ch. 820, 826; 108 L. J. Ch. 344.]

¹⁰ See *Re Whitting's Settlement* [1905] 1 Ch. 96; 74 L. J. Ch. 207 (C. A.). There is "a distinction between a will and a settlement for this purpose." *ib.*

2. DISPOSITION BY WILL

An agreement to use influence with a testator in favour of a particular person or object is void.⁹ On the other hand, it is well established that a man may validly bind himself or his estate by contract to make any particular disposition (if in itself lawful) by his own will.¹⁰ Such contracts were not recognized by Roman law,¹¹ and even a gift *inter vivos* of all the donor's after-acquired property would have been bad as an evasion of the rule: but in the modern law of Germany as with us, a contract of this sort (*Erbvertrag*) is good.¹²

3. AGREEMENTS IN RESTRAINT OF TRADE¹³

This class of cases presents a singular example of the common law, without aid from legislation and without any manifest discontinuity, having practically reversed its older doctrine in deference to the changed conditions of society and the requirements of modern commerce. The original principle is that a man ought not to be allowed to restrain himself by contract from exercising any lawful craft or business at his own discretion and in his own way. It is still true that "all interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void." So the rule is expressed by Lord Macnaghten in what is now the governing decision.¹⁴ "But," he continues, "there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case." The exceptions were introduced with much hesitation, and were long supposed to be confined within inflexible limits. But the former attempts at strict definition have proved inapplicable. As the law is now laid down, "it is a sufficient justification, and indeed the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

Observe that the Court has to consider the interests of the parties (not that of the promisee alone) and of the public: "regard must

⁹ *Debenham v. Oll* (1749) 1 Ves. Sr. 276.

¹⁰ *De Beil v. Thompson* (1841) 1 Beav. 460, s. c. nom. *Hammersley v. Baron De Beil* (1845) 12 Cl. & F. 45, 69 R. R. 18. *Brookman's trusts* (1869) L. R. 5 Ch. 182; 39 L. J. Ch. 138. A covenant to exercise a special power of testamentary appointment in a particular way is bad, for such a power is of a fiduciary nature: *Re Bradshaw* [1902] 1 Ch. 436; 71 L. J. Ch. 230.

¹¹ *Stipulatio hoc modo concepta*: Si herede[m] me non feceris, tantum dare spondes? inutilis est, quia contra bonos mores est hæc stipulatio: D. 45. 1. de v. o. 61.

¹² Savigny, Syst. 4, 142-5, and now by German Civil Code, s. 2274 *sqq.*, subject to requirements of form.

¹³ [See R. Y. Hedges, *Restraint of Trade* (1932), and D. K. Dix, *Competitive Trading* (1938); and, for American law, *Williston Contracts*, §§ 1633-1664A, and *Restatement of Contracts*, §§ 513-519.]

¹⁴ *Nordenfelt v. Maxim-Nordenfelt, &c.* (1894) A. C. 535, 565.

be had to the interest of the covenantor, and not solely to the interest of the covenantee. " In the case of an extensive restriction it is material whether the covenantor, and therefore also the public, would lose the benefit of his special skill and experience for an unreasonable time. An employee leaving the service of a firm is not to be treated like the vendor of a goodwill who must not derogate from his grant. " Indeed, it is now laid down as following from the latest decisions in the House of Lords that an employer cannot in general reasonably require an employee to undertake to abstain from competing with him after the employment is over. All the world may compete, and why not he? " This distinction is admitted to be novel. " Nothing is said against the validity of a covenant to keep trade secrets or not to solicit the employer's customers. " *

No universal test can be assigned for ascertaining what is reasonable, not even the rule formerly accepted that the restraint contracted for must be limited in space, or in some sense not a general restraint of trade. The precise object of the contract, and the nature and extent of the business interest to be protected, must be considered in every case. The kinds of contracts involving restraint of trade which usually occur in modern practice are agreements by the seller of a business not to compete with the buyer, by a partner or retiring partner not to compete with the firm, and by a servant or agent not to compete with his master or employer after the termination of the service of employment (which last, as we have just seen, is the least favoured). Obviously the measure of reasonable restrictions to protect the buyer, continuing partner, or employer in the case of a business with national or world-wide connections will be larger than in the case of a merely local trade or practice. What is reasonable in the particular case is a question of law for the Court. Examples will be given presently. Meanwhile something must be said of the early history and intermediate forms of the doctrine.

EARLY RULES

In the middle ages there was a general feeling, apparently popular and not derived from learned sources, against all agreements which tended to monopoly or keeping up prices. This was natural enough when the price of the necessities of life was for the most part regulated by public authority. At the end of the

¹⁴ *Lord Cozens-Hardy* M.R. *Morris v. Saxelby* [1915] 2 Ch. 57, 77, 84 L. J. Ch. 521.

¹⁵ *Id.* per Joyce J. in C.A. [1915] 2 Ch. 90, 84 L. J. Ch. 521. *Phillimore* L.J. dissented.

¹⁶ *Atwood v. Lamont* [1920] 3 K. B. 571, 90 L. J. K. B. 121, C. A. *Morris v. Saxelby* so interpreted by Younger L.J., Atkin L.J. agreeing. Cf. *Putman v. Taylor* [1927] 3 K. B. 637, 741, 96 L. J. K. B. 726, where the question actually in dispute was mainly of construction. According to nineteenth century economic doctrine the effect of this new departure ought to be a lowering of managers' salaries.

¹⁷ Note that wrongful dismissal being a repudiation of the whole contract, cancels a stipulation of this kind. *General Bill-posting Co. v. Atkinson* [1900] A. C. 118, 78 L. J. Ch. 77. *Measures Bros. v. Measures* [1910] 1 Ch. 336, 2 Ch. 248, not put on quite the same ground in C. A.

thirteenth century all the chandlers in a leet of Norwich were presented by the Court "pro quadam convencionem inter eos facta videlicet quod nullus eorum venderet libram candele minus quam alter."¹⁸

In the well-known *Dyer's case* in 2 H. V. 5, pl. 26, the action was debt on a bond conditioned that the defendant should not use his craft of a dyer in the same town with the plaintiff for half a year: a contract which would now be clearly good if made upon valuable consideration. The defence was that the condition had been performed. To this Hull J. said: "To my mind you might have demurred to him that the obligation is void, because the condition is against the common law; and *per Dieu* if the plaintiff were here he should go to prison till he had made fine to the King."¹⁹ This was not and could not be more than a dictum,²⁰ and the parties proceeded to issue on the question whether the condition had in fact been performed or not. Hull's opinion, however, was approved by all the Justices of the C. P. in a blacksmith's case in 29 Eliz., of which we have two reports.²¹ It does not appear in either case what was the real occasion or consideration of the contract. For aught the reports show it may have been the ordinary transaction of a sale of goodwill or the like.²²

It has been plausibly suggested by a learned American writer that the medieval doctrine is connected with the rules and customs forbidding a man to exercise any trade to which he had not been duly apprenticed and admitted: so that if he covenanted not to exercise his own trade, he practically covenanted to exercise none—in other words, not to earn his living at all.²³ Indeed, by an Act of 1574 (5 Eliz. c. 4; artificers and apprentices),²⁴ which consolidated earlier Acts of the same kind, not only the common labourer, but the artificer in any one of various trades, was compellable to serve in his trade if unmarried or under the age of 30 years, and not a forty-shilling freeholder or copyholder or "worth of his own goods the clear value of ten pounds." An agreement by a person within the statute not to exercise his own trade

¹⁸ Lect Jurisdiction of the City of Norwich, 5 Seld. Soc. 1892, p. 52. If authority be desired to show that such an agreement, long since common in fact, is now lawful, see *Ware and De Freville, Ltd. v. Motor Trade Assocn.* [1921] 3 K. B. 40; 90 L. J. K. B. 949, C. A. [approved by the H. L. in *Sorrell v. Smith* [1923] A. C. 700; 94 L. J. Ch. 347].

¹⁹ This Hull or Hull, Justice of C. P., is to be distinguished from Huls, who sat in K. B. till 3 H. V. His expletive has been wrongly supposed to be unique in the reports. In the earlier Year Books judicial asseverations of this kind are not uncommon. Hervey of Stanton ("the hasty") swore by *le sang que Dieu saigna*.

²⁰ Nowadays the Court may take an objection of this kind on its own motion. Such was not the medieval practice.

²¹ Moore, 242, pl. 379, fuller in 2 Leo. 210. Moore's report makes the odd mistake of putting South Mimms in Surrey.

²² The explanations offered by Lord Macclesfield in *Mitchel v. Reynolds* (1711) 1 P. Will. 181 and Sir W. Follett *arg.* in *Hitchcock v. Coker* (1837), 6 A. & E. at 447; 45 R. R. at 529, are merely conjectural attempts to find in the Year Book a modern point of view which is not there.

²³ Parsons on Contracts, 2, 255.
²⁴ [Repealed by the Conspiracy and Protection of Property Act, 1875 '38 & 39 Vict. c. 86] s.17].

might therefore be deemed, at any rate if unlimited, to amount to an agreement to omit a legal duty. At the same time absolute freedom of trade is positively asserted as the normal state of things assumed and upheld by the common law. It was resolved in the *Ipswich Tailors' case*¹¹ that at the common law no man could be prohibited from working in any lawful trade: and it was said that

"The statute of 5 Eliz. c. 4, which prohibits every person from using or exercising any craft mystery or occupation, unless he has been an apprentice by the space of seven years, was not enacted only to the intent that workmen should be skilful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades: and thereby it appears, that without an act of parliament none can be prohibited from working in any lawful trade."

And certain ordinances, by which the tailors of Ipswich forbade any one to exercise the trade of a tailor there until he had presented himself to the master and wardens and satisfied them of his qualification, were held void, inasmuch as

"Ordinances for the good order and government of men of trades and mysteries are good, but not to restrain any one in his lawful mystery."

This principle is still in force as regards agreements and combinations among members of trades not made for the protection of purchasers for value, but by way of systematic denial of each contracting party's ordinary discretion in managing his affairs.

An agreement between several master manufacturers to regulate their wages and hours of work, the suspending of work partially or altogether, and the discipline and management of their establishments, by the decision of a majority of their number, is in general restraint of trade as depriving each one of them of the control of his own business, and is therefore not enforceable.¹² It makes no difference that the object of the combination is alleged to be mutual defence against a similar combination of workmen. The case decides on the whole that neither an agreement for a strike nor an agreement for a lock-out is enforceable by law. The Court of Exchequer Chamber thus expressed the general principle in the course of their judgment:—

"Prima facie it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it [his trade] on according to his own discretion and choice. If the law has in any matter regulated or restrained his mode of doing this, the law

¹¹ (1615) 11 Co. Rep. 53 a, 54 b. The "mystery" here spoken of has nothing to do with *mysticism*, though trades in fact had their secrets. Like the French *métier*, it goes back to Lat. *ministerium* and signifies business or occupation. It must not be assumed that a medieval Court would have accepted the opinion that being free of a given trade, say at York, carries with it as matter of right the like freedom at Ipswich.

¹² So again in the *Case of Monopolies* (1602) 11 Co. Rep. 87 b.

¹³ *Hilton v. Eckersley* (1855-56) 6 E. & B. 47; in Exch. Ch. *ib.* 66; 24 L. J. Q. B. 353; 25 *ib.* 199; 106 R. R. 507. The *dicta* there, so far as they suggest that the agreement would be a criminal offence at common law, are overruled by *Mogul Steamship Co. v. McGregor & Co.* [1892] A. C. 25; 61 L. J. Q. B. 295. "No contract was ever an offence at common law merely because it was in restraint of trade": Lord Parker [1915] A. C. 797.

must be obeyed. But no power short of the general law ought to restrain his free discretion."²⁷

On like grounds a restrictive agreement between the members of a trade society as to the employment by any one member of travellers and other persons who had left the service of any other has been disallowed.²⁸ The like principles are applicable to a co-operative society of producers.²⁹

It is not an unlawful restraint of trade for several persons carrying on the same business in the same place to agree to divide the business among themselves in such a way as to prevent competition, and provisions reasonably necessary for this purpose are not invalid because they may operate in partial restraint of the parties' freedom to exercise their trade.³⁰ But a provision that if other persons, strangers to the contract, do not employ in particular cases that one of the contracting parties to whom as between themselves the business is assigned by the agreement, then none of the others will accept the employment, is bad.³¹

The reasons for the rule are set forth at large in the leading case of *Mitchel v. Reynolds*,³² and at a more recent date (1837) were put more concisely by the Supreme Court of Massachusetts, who held a bond void which was conditioned that the obligor should never carry on or be concerned in iron founding: —

"1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons for the sake of gain to deprive themselves of the power to make future acquisitions. And they expose such persons to impositions and oppression.

2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves.

3. They discourage industry and enterprise and diminish the products of ingenuity and skill.

4. They prevent competition and enhance prices.

5. They expose the public to all the evils of monopoly."³³

²⁷ 6 E. & B. at 74-5; 106 R. R. 522, 523. Strikes are not unlawful in themselves: see per Fletcher-Moulton L. J. in *Gozney v. Bristol Trade and Provident Society* [1909] 1 K. B. 901, 922; 78 L. J. K. B. 616; and cp. as to trade union rules *Osborne's case* [1911] 1 Ch. 540; 80 L. J. Ch. 315, C. A. A member of a society whose objects are in restraint of trade cannot sue for money due to him under the rules: *Russell v. Amalgamated Soc. of Carpenters and Joiners* [1910] 1 K. B. 506; 79 L. J. K. B. 507, C. A.

²⁸ *Mineral Water Bottle, &c. Society v. Booth* (1887) 36 Ch. Div. 465. The terms were: "No member of the society shall employ any traveller, carman, or outdoor employé, who has left the service of another member, without the consent in writing of his late employer, until after the expiration of two years from his leaving such service."

²⁹ *McEllistirm v. Ballymacelligott Co-op. Soc.* [1919] A. C. 548; 88 L. J. P. C. 59.

³⁰ Similarly, an agreement between buyers at an auction to bid on their joint account and not in competition is not generally unlawful: *Rawlings v. General Trading Co.* [1921] 1 K. B. 695; 90 L. J. K. B. 404, C. A.

³¹ *Collins v. Locke* (1879) (J. C.) 4 App. Ca. 674, 688; L. J. P. C. 68; *Jones v. North* (1875) L. R. 19 Eq. 426; 44 L. J. Ch. 388, a case not free from difficulties on other grounds, and apparently not fully argued or considered on this point.

³² (1711) 1 P. Wms. 181, and in 1 Sm. L. C., an elaborate judgment reviewing the older authorities.

³³ *Alger v. Thacker* (1837) 19 Pick. 51, 54. Agreements which aim at creating a monopoly, or raising the price of either goods or labour, have been constantly held void in the U. S. See Frank J. Goodnow, *Trade Combinations at common law*, Pol. Sci. Quart. xii, 212.

POLICY OF PARTIAL EXCEPTIONS

The qualified admission of restraints has been commonly spoken of as an exception to the general policy of the law. But it seems better to regard it rather as another branch of it. Public policy requires on the one hand that a man shall not by contract deprive himself of the common weal of his labour, skill, or talent, and on the other hand, that he shall be able to preclude himself from competing with particular persons so far as necessary to obtain the best price for his business or knowledge, when he chooses to sell it. Restriction which is reasonable for the protection of the parties in such a case is allowed by the very same policy that forbids restrictions generally, and for the like reasons: but it must be remembered, subject to the paramount interest of the public.

QUALIFICATIONS

In the early part of the seventeenth century the majority of the judges concluded that the policy of the law was not opposed to the seller of a business making the sale effectual by undertaking not to compete with the buyer. For that purpose, for a time certain and in a place certain a man may be well bound and restrained from using of his trade,' 'provided that it is upon a valuable consideration.' Restrictions extending to Newgate Market in London and to the whole of country towns such as Basingstoke and Newport (Isle of Wight) were allowed, but it was said that such a promise cannot be good if the restraint be general throughout England. These authorities were confirmed in 1711 by *Mitchel v. Reynolds*,¹⁶ the earliest case usually referred to, and it was settled that if a particular restrictive contract of the circumstances brought before the Court appears to be a just and honest contract, it will be upheld. At that time, however, and long afterwards, it was taken for granted that such a contract could in no case be reasonable unless limited, at any rate in space. 'Where the restraint is general, not to exercise a trade throughout the kingdom,' it was thought that it must be bad as a matter of law. What does it signify to a tradesman in London what another does at Newcastle?¹⁷

At this day we have no difficulty in seeing that it may signify very much to a merchant in London what another is doing, not only at Newcastle, but at Singapore or San Francisco. Fortunately no positive and direct decision stood in the way of the law being authoritatively declared by the House of Lords in a form suited to the conditions of modern trade and communications.

¹⁶ *James V. C. Leather Cloth Co. v. Lonsdale* (1869) L. R. 9 Eq. 345, at 353.

¹⁷ *Regent v. Parry* (1614) 2 Bulst. 136, Coke's opinion adopted by the Court.

¹⁸ To same effect, *Broad v. Jollyffe*, Cro. Jac. 596, *Bragg v. Stanner*, Palm. 172.

¹⁹ *Prugmell v. Goss*, Aleyn, 67.

²⁰ 1 St. L. C. 19th ed. 462.

²¹ 1 St. L. C. 19th ed. 462.

MODERN DEVELOPMENT

Before the middle of the nineteenth century it was settled that, although a valuable and not merely colourable consideration there must be, even if the contract is under seal, the Court will not attempt to estimate the adequacy of the consideration in this more than in any other class of cases.⁴⁰

Gradually the question whether the restriction imposed was on the whole commensurate, in point of law, with the benefit conferred, became the only question seriously discussed. And now the *dicta* which apparently bound contracts of this kind within hard and fast rules must be taken not as general propositions of law, but as applications of the general principle of reasonableness to conditions of fact which at the time might well seem to be permanent, but which have passed away.

In the leading case before the House of Lords, an inventor and manufacturer of guns and ammunition, doing business with military authorities in various parts of the world, sold his business to a company, and covenanted not to compete with the company in that part of the business for twenty-five years: this was held not too wide in the circumstances, though a distinct covenant not to engage in any business competing with that for the time being carried on by the company was disallowed.⁴¹

Meanwhile various relaxations of the supposed fixed rule as to limits had been sanctioned. These are now nothing else than special illustrations of the broader principle; but as such they are still useful and instructive. A limit of time is not necessary to make an agreement in restraint of trade valid, and it is not of itself sufficient;⁴² but the extent of a time-restriction is a material element in deciding whether the agreement as a whole is reasonable.⁴³ It has never been doubted that a partner may bind himself absolutely not to compete with the firm during the partner-

⁴⁰ *Hitchcock v. Coker* (1837) 6 A. & E. 438; 45 R. R. 522 (Ex. Ch.); *Gravelly v. Barnard* (1873) 1. R. 18 Eq. 518; 43 L. J. Ch. 659. Formerly it was thought (it would seem from some expressions in the earlier cases) that where the contract was by deed the consideration must appear on the face of the deed.

⁴¹ *Nordenfelt v. Maxim-Nordenfelt, & Co.* [1894] A. C. 535; 63 L. J. Ch. 908; affirming *ex. nom. Maxim-Nordenfelt, & Co. v. Nordenfelt* [1893] 1 Ch. 630; 62 L. J. Ch. 273. In the *C. A.* Bowen L. J. endeavoured, in an elaborate judgment, to show that the common law rule in its old form was still in force, though the exceptions were extended. In the *H. L.* Lord Herschell, thinking this historically correct, concluded on the whole that the old rule had become "inapplicable to the altered conditions which now prevail," [1894] A. C. at 548. Lord Macnaghten thought Lord Bowen's distinctions too refined, justified the decisions in equity which Lord Bowen had criticized for disregarding the common law rule, and denied that there had ever really been a hard and fast rule of law. Down to a recent time there was a strong presumption in fact against a restriction without limit of space being reasonably required for the protection of the promisee, but there was no decision or principle to make that presumption applicable to the different state of facts produced by the nature of modern trade and traffic. Lord Watson, Lord Ashbourne, and Lord Morris, without precisely concurring in this, appear to have agreed in substance with Lord Macnaghten.

⁴² *Hitchcock v. Coker* (1837) 6 A. & E. 438; 45 R. R. 522, Ex. Ch., followed *Fitch v. Dewar* [1912] 2 A. C. 158; 90 L. J. Ch. 436 (where the restriction in space was very moderate). ⁴³ *Eastes v. Russ* [1914] 1 Ch. 468; 83 L. J. Ch. 329, C. A.

ship: so may a servant in a trade bind himself absolutely not to compete with the master during his time of service."⁴⁴ But competition after the service is determined will not, it now appears, be restrained unless for special reasons. "An employer may not, after his servant has left his employment, prevent that servant from using his own skill and knowledge in his trade or profession, even if acquired when in the employer's service. That skill and knowledge are only placed at the employer's disposal during the employment. . . . Accordingly covenants against competition by a former servant are as such not upheld": they are admissible only so far as "reasonably necessary for the protection of the proprietary rights of the covenantee," that is, rights in the nature of trade secrets or trade connexion, and the Court regards them with less favour than agreements between parties on equal terms for the purpose of avoiding undue competition." A contract not to divulge a trade secret need not be qualified, and a man who enters into such a contract may to the same extent bind himself not to carry on a manufacture which would involve disclosure of the process intended to be kept secret. Indeed it has been said that "sales of secret processes are not within the principle or the mischief of restraints of trade at all." [Where an employee makes an invention or discovery in the course of his employment, during working hours and with the materials of his employers, there is an implied term in the contract of service that such invention or discovery becomes the property of his employers."] An undertaking by a tradesman purchasing goods from the manufacturers not to sell them below specified prices, and not to sell to any retail trader without taking a similar agreement from him, is not in general restraint of trade; for the manufacturers, not being bound to make or sell their goods at all, or to sell to this or that person, are entitled to sell on their own terms."

Whether the restriction contracted for in any particular case be reasonable is a question not of fact but of law," and evidence of persons in the trade as to what they think reasonable is not admissible." A covenant not to carry on "any business whatsoever," within however narrow limits of time and space, is manifestly unreasonable. Nor will the Court construe it as if limited

⁴⁴ *Wallis v. Day* (1837) 2 M. & W. 273, 46 R. R. 602.

⁴⁵ *Younger L.J. Atwood v. Lamont* [1920] 3 Ch. 571, 90 L. J. Ch. 121.

⁴⁶ *Per Scrutton L.J. English Hop Growers v. Dering* [1928] 2 K. B. 174, 180. 90 L. J. K. B. 469.

⁴⁷ *Leather Cloth Co. v. Jansons* (1869) L. R. 9 Eq. 345, at 353. [See C. J. W. Farwell K.C. (afterwards Mr. Justice Farwell), in 44 L. Q. R. (1928) 66-71, "Covenants of Restraint of Trade."]

⁴⁸ *Bowen L.J. Maxim-Nordenfelt Co. v. Nordenfelt* [1893] 1 Ch. 630, 660; but *quæ* whether this distinction be now necessary.

⁴⁹ [*Triplex Safety Glass Co. v. Scovell* [1928] Ch. 211; 107 L. J. Ch. 91.]

⁵⁰ *Elliman, Sons & Co. v. Carrington & Son* [1901] 2 Ch. 273.

⁵¹ A bold but hopeless attempt was made to dispute this in *Dowden and Pook v. Pook* [1904] 1 K. B. 45; 73 L. J. K. B. 28, C. A.

⁵² *Haynes v. Doman* [1899] 2 Ch. 13; 68 L. J. Ch. 419, C. A.

to the particular business which is really in question.⁵⁵ But a covenant not to "deal or transact business" with customers of the covenantees or of their successors may be confined by the context to business of the same kind as that carried on by them at the date of the agreement.⁵⁶ A covenant to retire, without expressed limit in space or time, from a partnership, and "so far as the law allows, from the trade or business thereof in all its branches," is bad for unreasonableness if the words "so far as the law allows" are surplusage, and bad for uncertainty if they are not; the parties cannot throw on the Court the task of settling their agreement for them.⁵⁷

A restrictive clause is not reasonable if it has the effect of making the covenantee the sole judge whether a new business undertaken by the covenantor competes with his own or not.⁵⁸ A restrictive covenant which contains or may be read as containing distinct undertakings bounded by different limits of space or time, or different in subject-matter, may be good as to part and bad as to part.⁵⁹ But this does not mean that a single covenant may be artificially split up in order to pick out some part of it that can be upheld. Severance is permissible only in the case of a covenant which is in effect a combination of several distinct covenants.⁶⁰ Notwithstanding what may have been said in earlier cases, the burden of proof is on the covenantee, asserting an exception from the general rule, to make it good by showing that the restraint is reasonable.⁶¹ As regards an employee's covenant, the measure of reasonableness is the protection of the very trade in which he has contracted to serve and in fact serves.⁶² Where a scheme of benefits by way of pension for the employees of a large undertaking, provided for by contributions from both employer and employed, contained a clause determining the pension of any beneficiary who should engage in any competing business, the Court held that this clause, whether enforceable or not, made no difference to the validity of the other dispositions.⁶³

Where a covenant is bad for restraint of trade it is void, not

⁵⁵ *Baker v. Hedgecock* (1888) 39 Ch. D. 520; 37 L. J. Ch. 889; *Perls v. Saalfeld* [1892] 2 Ch. 149; 61 L. J. Ch. 409, C. A.

⁵⁶ *Mills v. Dunham* [1891] 1 Ch. 576; 60 L. J. Ch. 362, C. A. An unqualified covenant not to solicit such customers will not be construed, without more, as limited to those who were customers during the covenantor's employment, and is too wide: *Konski v. Peat* [1915] 1 Ch. 530; 84 L. J. Ch. 513.

⁵⁷ *Davies v. Davies* (1887) 36 Ch. Div. 359; 56 L. J. Ch. 962.

⁵⁸ *Perls v. Saalfeld* [1892] 2 Ch. 149; 61 L. J. Ch. 409, C. A.

⁵⁹ See *Baines v. Geary* (1887) 35 Ch. D. 154, and authorities there collected; *Maxim-Nordenfelt Co. v. Nordenfelt* [1893] 1 Ch. 630; 62 L. J. Ch. 273, C. A. (no further appeal on this point). [*Goldsoll v. Goodman* [1915] 1 Ch. 292; 84 L. J. Ch. 228.]

⁶⁰ *Younger L. J. (Atkin L. J. agreeing) Attwood v. Lamont* [1920] 3 Ch. 571; 90 L. J. Ch. 121. [In *Anson, Contract* (19th ed. 1945), 235-236, it is pointed out that the authorities exhibit two possible views as to the test for severability.]

⁶¹ [1920] 3 Ch. 587. And see per Lord Hanworth, *Palmolive Co. v. Freedman* [1928] Ch. 264, 271; 97 L. J. Ch. 40.

⁶² It cannot be extended to cover the protection of other associated employers whom he has not in fact served, though under the special contract of service he may be bound to do so if required: *H. Leatham & Sons v. Johnstone-White* [1907] 1 Ch. 322; 76 L. J. Ch. 304, C. A. The real question was on the construction of the agreement.

⁶³ *Re Prudential Company's trust deed* [1934] Ch. 338; 103 L. J. Ch. 179.

voidable at the covenantor's option. If he chooses to perform it he does not thereby entitle himself to sue on the counter-promise."⁴¹

The tabular statement of cases subjoined to the report of *Avery v. Langford* (1854)⁴² shows what amounts of restriction were held reasonable or not for the circumstances of different kinds of business down to that date. It may be convenient to add later decisions in the same form. The reader must be warned that the tables do not include all reported decisions.⁴³

RESTRICTION HELD REASONABLE

Name and Date of Case	Trade or Business	Extent of Restriction in Time.	Extent of Restriction in Space.
1835 <i>Dundy v. Henderson</i> , 11 Ex. 144, 24 L. J. Ex. 324, 105 R. R. 488. ⁴⁴	Solicitor	21 years from determination of defendant's employment as managing clerk to plaintiff.	21 miles from parish of Tormoham, Torquay
1836 <i>James v. Lee</i> , 1 H. & N. 189, 26 L. J. Ex. 9, 108 R. R. 312	Manufacture or sale of shabbing and roving frames not fitted with plaintiff's patent invention	Continuance of defendant's licence from plaintiff to use and sell the patented invention.	England* (not limited in terms)
1837 <i>Bransell v. Ince</i> , 24 Beav. 307, 26 L. J. Ch. 663	Cowkeeper, milkman, milk-seller, or milk-carrier	Continuance of defendant's service with plaintiff and 24 months after	Three miles from Charles Street, Grosvenor Sq
1859 <i>Mumford v. Gehrig</i> , 7 C. N. B. 5, 305; 24 L. J. C. P. 105	Travelling in lace trade for any house other than plaintiff	Unlimited	"Any part of the same ground," i.e., the district in which defendant was employed as traveller for plaintiff.
1861 <i>Horns v. Parsons</i> , 12 Beav. 328, 32 L. J. Ch. 247	Horse-hair manufacturer	Unlimited	200 miles from Birmingham
1863 <i>Clarkson v. Edge</i> , 33 Beav. 227, 33 L. J. Ch. 443	Gas meter manufacturer and gas engineer	Ten years	20 miles from Great Peter Street, Westminster
1869 <i>Catt v. Towle</i> , 1 L. R. 4 Ch. 634, 38 L. J. Ch. 665	Covenant by purchaser of land that vendor should have exclusive right of supplying beer	Unlimited	Any public house erected on the land
1869 <i>Leather Cloth Co v. Lovett</i> , L. R. 9 Eq. 343, 39 L. J. Ch. 86. ⁴⁵	Manufacture or sale of patent leather cloth	Unlimited	Europe (but to be construed as Great Britain, or United Kingdom, <i>vide</i> per L. R. 9 Eq. at 357. ⁴⁶)
1874 <i>Gravelly v. Renard</i> , L. R. 18 Eq. 518, 43 L. J. Ch. 659	Surgeon	So long as plaintiff or his assigns should carry on business	Parish of Newark and ten miles round, excepting the town of Newark.
1875 <i>Printing and Amusement Registering Co v. Sampson</i> , L. R. 19 Eq. 462, 44 L. J. Ch. 705.	Agreement by vendor of patent to assign to purchaser all after-acquired patent rights of like nature.	Lifetime of vendors.	Europe. ⁴⁷

⁴¹ *Wyatt v. Kreglinger* [1933] 1 K. B. 793; 102 L. J. K. B. 315, per Sleser L. J. *ad fin.*

⁴² *Kay*, 667; 23 L. J. Ch. 837; 101 R. R. 800.

⁴³ [Investigation of the reports proved this to be true with respect to the author's last edition. As the inclusion of all the cases omitted would have considerably enlarged this part of the book without adding anything to its exposition of principles, I have left the text as it stood. An adequate collection of references to the decided cases will be found in 43 *English and Empire Digest*, "Trade and Trade Unions," Part V. (Restraint of Trade by Agreement, 19-77); the Supplement (1941) embodies later cases.]

⁴⁴ Whether an agreement not to *reside* at a given place as well as not to carry on business be good, *quære*. See pp. 326-327.

⁴⁵ *Op. Diamond Match Co. v. Roebur* (1887) 106 N. Y. 473; 60 Am. Rep. 464, where a restriction covering the whole territory of the United States except Montana and Nevada was held not too wide. "The boundaries of the States [i.e., the municipal jurisdictions of New York or other individual States] are not those of trade and commerce, and business is restrained within no such limit."

RESTRICTION HELD REASONABLE

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.
1876. <i>May v. O'Neill</i> , W. N. 179; 44 L. J. Ch. 960.	Solicitor (covenant in clerk's articles).	Unlimited	London, Middlesex and Essex; and unlimited as to acting for clients of plaintiff's firm or anyone who had been such clients during the term of the articles. ⁶⁹
1879. <i>Darcy v. Shannon</i> , 4 Ex. D. 81; 48 L. J. Ex. 459 (no objection taken).	Outfitter and tailor.	Unlimited (taken by the Court as for joint lives of plaintiff and defendant).	Five miles from Devonport.
1880. <i>Rouillon v. Rouillon</i> , 14 Ch. D. 351; 49 L. J. Ch. 139.	Travelling in champagne trade; setting up or entering into partnership in same trade.	Two years after leaving plaintiff's service as to travelling; ten as to dealing on own account.	Unlimited.
1891. <i>Adlitt v. Dunham</i> [1891] 1 Ch. 576; 60 L. J. Ch. 569, C. A.	Travelling in food, anti-septic business.	Unlimited.	Unlimited. (= England and Wales, see per Lindley L. J. [1891] 1 Ch. 585).
(Note that the business to which the restriction applied was held to be confined by the context to business of the kind carried on by the covenantees at the date of the agreement)			
1894. <i>Rogers v. Meddalls</i> [1894] 3 Ch. 346; 62 L. J. Ch. 219; 67 L. T. 729, C. A.	Travelling in beer, &c.	Two years.	100 miles from Cardiff.
1894. <i>Nordenfelt v. Maxim-Nordenfelt Arms and Ammunition Co</i> [1894] A. C. 135.	Manufacture of guns, gun mountings and carriages, gunpowder, explosives and ammunition (and, with certain exceptions, any other business carried on by the company, <i>scilicet</i> , this was too wide).	25 years from the incorporation of the company.	Unlimited: the breach assigned was in Belgium.
1896. <i>Dubouche v. Goldstein</i> [1896] 1 Q. B. 478; 65 L. J. Q. B. 397.	Dairymen.	Indefinite time continuance of service and after.	No definition of space, but held limited by context to actual locality of business.
1898. <i>W. Robinson & Co. Ltd. v. Herts</i> [1898] 2 Ch. 451; 67 L. J. Ch. 644, C. A.	Enamelled hollow ware dealers.	Three years from time of dismissal from company's service.	150 miles from Wolverhampton.
1899. <i>Underwood & Son v. Barker</i> [1899] 1 Ch. 300; 68 L. J. Ch. 501, C. A.	Hay and Straw merchants.	One year: carrying on, serving, or being agent in business.	United Kingdom, France, Belgium, Holland, Canada.
1899. <i>Haynes v. Thomas</i> [1899] 2 Ch. 15; 68 L. J. Ch. 419, C. A.	Hardware manufacturer.	Unlimited working or serving in same kind of business.	Radius of 25 miles.
1914. <i>Goldman v. Goldmans</i> [1915] 1 Ch. 992, 84 L. J. Ch. 228, C. A.	Imitation pearls and other jewellers' sale of business.	Two years.	United Kingdom and Isle of Man. Words extending to United States and several places in Europe held too wide but severable. ⁷¹
1920. <i>Fitch v. Dewar</i> [1921] 2 A. C. 158; 90 L. J. Ch. 436.	Solicitor's managing clerk.	Unlimited.	Seven miles from Tamworth.

⁶⁹ *Sed. qu.* whether the restriction was not excessive, per Lord Birkenhead in *Fitch v. Dewar* [1921] 2 A. C. at 167; 90 L. J. Ch. 436.

⁷⁰ *Allsopp v. Whistery* (1872) L. R. 15 Eq. 59; 42 L. J. Ch. 12, a contrary decision on closely similar facts, was disregarded; it seems against the current of authority even before the *Nordenfelt* case.

⁷¹ The covenant was also held good only as to dealing in imitation jewellery.

A covenant by the outgoing manager of a business not to deal with former customers is not rendered too wide merely by possible difficulty in identifying them."⁷²

RESTRICTION HELD UNREASONABLE

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.
1898. <i>Ehrman v. Bartholomew</i> [1898] 1 Ch. 671; 67 L. J. Ch. 319.	Traveller for wine merchant.	Terms as to time and place not in question: the undertaking was not to "engage or employ himself in any other business" during the continuance of the agreement, which was not necessarily confined to the continuance of the service.	
(Note the distinction between an agreement of this type and an agreement not to be interested in a competing business. The latter kind may be enforceable by injunction: <i>Raly-a-Bell Burglar and Fire Alarm Co. v. Eister</i> [1926] Ch. 609; 95 L. J. Ch. 345).			
1903. <i>Dowden & Pook v. Pook</i> [1904] 1 K.B. 45; 73 L. J. K. B. 38, C. A.	Cider Merchant in S. Devon.	Five years.	Unlimited.
1907. <i>H. Leatham & Sons v. Johnstone-White</i> ; see p. 327.	Millers in N. of England.	Five years.	United Kingdom. ⁷³
1908. <i>Sir W. C. Lang & Co. v. Andrews</i> [1909] 1 Ch. 763; 78 L. J. Ch. 80.	Newspaper reporter.	No limit.	Radius of twenty miles from Sheffield.
1913. <i>Mason v. Provident Clothing & Supply Co.</i> [1913] A. C. 724; 82 L. J. K. B. 1133.	Canvasser in the company's Islington branch district.	Three years after termination of employment.	25 miles from London.
1913. <i>Nevanas v. Walker</i> [1914] 1 Ch. 413; 83 L. J. Ch. 380.	Manager of meat importing business, Liverpool (mainly N. England and Midlands).	One year after determination of agreement.	United Kingdom.
1913. <i>Eastes v. Russ</i> [1914] 1 Ch. 468; 83 L. J. Ch. 329, C. A.	Assistant microscopist in pathological laboratory.	Unlimited (construed as for covenantor's life).	Ten miles from employer's laboratory.
1915. <i>Morris v. Saxelby</i> [1916] 1 A. C. 688; 85 L. J. Ch. 210.	Pulley blocks and lifting machinery, draughtsman and branch manager.	Seven years from cessation of employment.	United Kingdom.
1917. <i>Evans & Co. v. Heathcote</i> , [1917] 2 K. B. 336; 86 L. J. K. B. 1324; [1918] 1 K. B. 418; 87 L. J. K. B. 593, in C. A. reversing the judgment below on a different point.	Both parties members of an association of manufacturers of "cased tubes" under agreement for regulation of prices and output and sale only to certain approved firms.	Unlimited, in the sense that there was no provision for voluntary withdrawal from the association.	No question of space limit.
1919. <i>McElkirim v. Ballymacelligott Co-op. Soc.</i> [1919] A. C. 548; 88 L. J. P. C. 59.	Making dairy products from milk supplied by members of the society from their farms: the society taking the milk at price fixed by committee, members not to sell to outside customers without committee's consent.	As in last case above; considered to be practically for each member's life.	Produce of specified townships in county Kerry.

⁷² *Gilford Motor Co. v. Horne* [1933] Ch. 935; 102 L. J. Ch. 212, C. A., a case more remarkable for the vigour with which it was contested than for any light it throws on matter of principle.

⁷³ The question in dispute was whether the special contract extended to the protection of other associated concerns whose business did practically cover the United Kingdom.

RESTRICTION HELD UNREASONABLE

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.
1919. <i>Hepworth Muffg. Co. v. Ryott</i> [1920] 1 Ch. 1; 89 L. J. Ch. 69, C. A.	Act for kinema film producers under pseudonym. Agreement not to use the same pseudonym for any purpose after determination of agreement, and (in effect) not to allow it to be advertised by any future employer.	Apparently life of promisor.	No limit expressed.
1920. <i>Attwood v. Lamont</i> [1920] 3 K. B. 571; 90 L. J. K. B. 121, C. A.	Draper, tailor and general outfitter: manager of tailoring department. Held, that the covenant could not be severed so as to confine it to the tailoring business, and that would be bad.	Unlimited.	Ten miles from Kidderminster.
1933. <i>Wyatt v. Kreglinger</i> [1933] 1 K. B. 791; 102 L. J. K. B. 325, C. A. ⁷⁴	Wool trade. Condition annexed to grant of pension to retiring employee: "You are at liberty to undertake any other employment or enter any business except in the wool trade."	No limit of time or space expressed.	

(*Sumbl.* there was on the facts no offer of a binding agreement, but if there was an agreement it was void.)

1934. <i>Vancouver Malt & Saki Brewing Co. v. Vancouver Breweries</i> [1934] A. C. 181 (J. C. from British Columbia).	Brewing of malt liquor and saki (only saki in fact made). Assignment of business except as to saki.	15 years.	No limit.
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(*Sumbl.* the nominal assignment was merely a cloak for an undertaking not to compete: see [1934] A. C. at 190).

It is now settled, after some little uncertainty, that distances specified in contracts of this kind are to be measured as the crow flies, *i.e.*, in a straight line on the map, neglecting curvature and inequalities of surface. This is only a rule of construction, and the parties may prescribe another measurement if they think fit, such as the nearest mode of access.⁷⁵

A certain number of decisions are only on the construction of words describing the business to be restricted.⁷⁶

It will be seen that the denial of hard and fast rules in the *Nordenfelt case* has not led to judicial laxity in dealing with restrictive agreements, but rather to more careful weighing, in the particular circumstances of each case, of what is allowable in the interest of the parties and of the public.

In British India the Contract Act unfortunately copied a wilfully narrowed version of the Common Law rule, as understood

⁷⁴ [See the criticism of this decision in 49 L. Q. R. (1933) 465—467.]

⁷⁵ *Moufflet v. Cole* (1872) L. R. 7 Ex. 70, in Ex. Ch. 8 Ex. 32; 42 L. J. Ex. 8. As to what amounts to a breach of covenant not to carry on business within certain limits, see *Brampton v. Beddoes* (1863) 13 C. B. N. S. 538.

⁷⁶ Such as *Stuart v. Diplock* (1889) 43 Ch. Div. 343; 59 L. J. Ch. 142; *Fitz v. Iles* [1893] 1 Ch. 77; 62 L. J. Ch. 258; *William Cory & Son v. Harrison* [1906] A. C. 274; 75 L. J. Ch. 714; and to some extent *H. Leatham & Son's case*, p. 327; *Woodbridge v. Bellamy* [1911] 1 Ch. 326; 80 L. J. Ch. 265; *Hadsley v. Dwyer-Smith* [1914] A. C. 979; 83 L. J. Ch. 770. A covenant not to practise as a solicitor does not include acting as managing clerk to another solicitor: *Way v. Bishop* [1928] Ch. 647; 97 L. T. Ch. 267, C. A.

more than half a century ago, from the draft Civil Code of New York.⁷⁷

It is clear law that a contract to serve in a particular business for an indefinite time, or even for life, is not void as in restraint of trade or on any other ground of public policy.⁷⁸ It would not be competent to the parties, however, to attach servile incidents to the contract, such as unlimited rights of personal control and correction, or over the servant's property,⁷⁹ [or that would deprive him of his sole means of support⁸⁰]. Short of this, indeed, a lender of money cannot impose on the borrower terms that forbid him to change his employment or residence or dispose of his property without the lender's consent.⁸¹ It is undisputed that an agreement by A. to work for nobody but B. in A.'s particular trade, even for a limited time, would be void in the absence of a reciprocal obligation upon B. to employ A.⁸² But a promise by B. to employ A. may be collected from the whole tenor of the agreement between them, and so make the agreement good, without any express words to that effect.⁸³

4. THE JUDICIAL TREATMENT OF UNLAWFUL AGREEMENTS IN GENERAL

Thus far of the various specific grounds on which agreements are held unlawful. It remains for us to give as briefly as may be the rules which govern our Courts in dealing with them, and which are almost without exception independent of the particular ground of illegality. The general principle that an unlawful agreement cannot be enforced is not a sufficient guide. We still have to settle more fully what is meant by an unlawful agreement. For an agreement is the complex result of distinct elements, and the illegality must attach to one or more of those elements in particular. It is material whether it be found in the promise, the consideration, or the ultimate purpose. There are questions of evidence and procedure for which auxiliary rules are needed within the bounds of purely municipal law. Moreover, when the jurisdictions within which a contract is made, is to be performed, and

⁷⁷ Act ix of 1872, s. 27 ; see commentary in ed. Pollock and Mulla, 6th ed. 1931, 210 *seq.* for the results.

⁷⁸ *Wallis v. Day* (1837) 2 M. & W. 273 ; 46 R. R. 602. The law of Scotland is apparently the same according to the modern authorities ; [but a learned critic in 55 *Juridical Review* (1943), 52, considers it "more than doubtful whether Scots law would to-day recognise a contract of service for life."]

⁷⁹ See Hargrave's argument in *Sommersell's case* (1771-2) 20 St. Tr. 49, 66, and Bowen L.J. 36 Ch. Div. at 393. By the French law indefinite contracts of service are not allowed : Cod. Civ. 1780 : "On ne peut engager ses services qu' à temps, ou pour une entreprise déterminée : so the Italian Code, 1628. The German Civil Code recognizes them, s. 624 ; but a contract for personal service for any term over five years may after the first five years be determined by the employer by six months' notice.

⁸⁰ [*King v. Michael Faraday, Ltd.* [1939] 2 K. B. 753 ; 108 L. J. K. B. 589.]

⁸¹ *Horwood v. Millar's, &c. Co.* [1917] 1 K. B. 305 ; 86 L. J. K. B. 190, C. A.

⁸² See next note, and cp. the similar doctrine as to promises of marriage, *supra*.

⁸³ *Pilkington v. Scott* (1846) 15 M. & W. 657 ; 15 L. J. Ex. 329 ; 71 R. R. 781. Cp. *Hartley v. Cummings* (1847) 5 C. B. 247 ; 17 L. J. C. P. 84 ; 75 R. R. 722.

is sued upon, do not coincide, it has to be ascertained by what local law the validity of the contract shall be determined, or there may be a "conflict of laws in space": again, if the law be changed between the time of making the contract and the time of performance there may be "conflict of laws in time."

This general division is a rough one, but will serve to guide the arrangement of the following statement.

UNLAWFULNESS OF AGREEMENT AS DETERMINED BY PARTICULAR ELEMENTS

1. A lawful promise made for a lawful consideration is not invalid by reason only of an unlawful promise being made at the same time and for the same consideration.

In *Pigot's case*⁸⁴ it was resolved that if some of the covenants of an indenture or of the conditions indorsed upon a bond are against law, and some good and lawful, the covenants or conditions which are against law are void *ab initio* and the others stand good. Accordingly "from *Pigot's case*"⁸⁵ to the latest authorities it has always been held that when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal and some illegal at common law, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot."⁸⁶ And where a transaction partly valid and partly not is deliberately separated by the parties into two agreements, one expressing the valid and the other the invalid part; there a party who is called upon to perform his part of that agreement which is on the face of it valid cannot be heard to say that the transaction as a whole is unlawful and void.⁸⁷

It was formerly supposed that where a deed is void in part by statute it is void altogether: but this is not so. "Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."⁸⁸ The application of the rule is general; there is no special rule as to agreements alleged to be in restraint of trade, and severability is in every case a matter of construction.⁸⁹

⁸⁴ (1615) 11 Co. Rep. 27 b.

⁸⁵ Referred to in the report as 6 Co. Rep. 26; it is really in vol. 6, ed. 1826, which contains parts 11, 12 and 13.

⁸⁶ *Bank of Australasia v. Breillat* (1847) 6 Moo. P. C. 152, 201; 79 R. R. 24, 58.

⁸⁷ *Odessa Tramways Co. v. Mendel* (1878) 8 Ch. Div. 235; 47 L. J. Ch. 505. But an agreement, e.g. to refer disputes to a named arbitral jurisdiction, which is merely auxiliary to a substantive agreement or class of agreements cannot acquire a separate validity of its own by being expressed in a separate document: *Joe Lee, Ltd. v. Lord Dalmeny* [1927] 1 Ch. 300; 96 L. J. Ch. 174.

⁸⁸ Per Willes J. *Pickering v. Ilfracombe Ry. Co.* (1868) L. R. 3 C. P. at 250; and see *Royal Exchange Assurance Corporation v. Sjörforsäkrings Aktiebolaget Vega* [1901] 2 K. B. 567, 573; 70 L. J. K. B. 874.

⁸⁹ *Pulsman v. Taylor* [1927] 1 K. B. 637, 741; 96 L. J. K. B. 726. [But see page 327, note ⁸¹]

2. If any part of a single consideration for a promise or set of promises is unlawful, the whole agreement is void.

This rule assumes the consideration not to be severable, and in such a case it is impossible to assign a lawful consideration to the promise or any of the promises induced by it.⁹⁰ In other words, where independent promises are in part lawful and in part unlawful, those which are lawful can be enforced; but where any part of an entire consideration is unlawful, all promises founded upon it are void.⁹¹

3. When the immediate object of an agreement is unlawful the agreement is void.

This is an elementary proposition, for which it is nevertheless rather difficult to find unexceptionable words. We mean it to cover only those cases where either the agreement could not be performed without doing some act unlawful in itself, or the performance is in itself lawful, but on grounds of public policy is not allowed to be made a matter of contract. The statement is material chiefly for the sake of the contrasted class of cases under the next rule.

4. When the immediate object or consideration of an agreement is not unlawful, but the intention of one or both parties in making it is unlawful, then—

If the unlawful intention is at the date of the agreement common to both parties, or entertained by one party to the knowledge of the other, the agreement is void.

If the unlawful intention of one party is not known to the other at the date of the agreement, there is a contract voidable at the option of the innocent party if he discovers that intention at any time before the contract is executed.

Here it is necessary to consider what sort of connection of the subject-matter of the agreement with an unlawful plan or purpose is enough to show an unlawful intention that will vitiate the agreement itself. This is not always easy to determine. In the words of the Supreme Court of the United States:—

“Questions upon illegal contracts have arisen very often both in England and in this country; and no principle is better settled than that no action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law. How far this principle is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy.”⁹²

We have in the first place a well-marked class of transactions

⁹⁰ See *Jones v. Waite* (1839), 5 Bing. N. C. 341, 356; 50 R. R. at 707.

⁹¹ [What is the position where the consideration for a promise is another promise? That point does not appear to have been squarely faced in our law. For American law with respect to it, see Williston, *Contracts*, § 1782, and *Restatement of Contracts*, § 607.]

⁹² *Armstrong v. Toler* (1826) 11 Wheat. at 272. [It is still the leading case on the topic: Williston, *Contracts*, § 1752, note 6.]

where there is an agreement for the transfer of property or possession for a lawful consideration, but for the purpose of an unlawful use being made of it. All agreements incident to such a transaction are void; and it does not matter whether the unlawful purpose is in fact carried out or not.⁹³ The later authorities show that the agreement is void, not merely if the unlawful use of the subject-matter is part of the bargain, but if the intention of the one party so to use it is known to the other at the time of the agreement.⁹⁴ Thus money lent to be used in an unlawful manner cannot be recovered.⁹⁵ It is true that money lent to pay bets could be recovered at common law,⁹⁶ but that was because there is nothing unlawful in either making a bet or paying it if lost, though the payment cannot be enforced. If goods are sold by a vendor who knows that the purchaser means to apply them to an illegal or immoral purpose, he cannot recover the price: it is the same of letting goods on hire.⁹⁷ If a building is demised in order to be used in a manner forbidden by a Building Act, the lessor cannot recover on any covenant in the lease.⁹⁸ And in like manner if the lessee of a house which to his knowledge is used by the occupiers for immoral purposes assigns the lease knowing that the assignee means to continue the same use, he cannot recover on the assignee's covenant to indemnify him against the covenants of the original lease.⁹⁹ It does not matter whether the seller or lessor does or does not expect to be paid out of the fruits of the illegal use of the property.¹

An owner of property who has contracted to sell or let it, but finds afterwards that the other party means to use it for an unlawful purpose, is, of course, entitled (if not bound) to rescind the contract. But a completely executed transfer of property or an interest in property, though made on an unlawful consideration, or, it is conceived, for an unlawful purpose known to both parties, is valid, and cannot afterwards be set aside.² And an innocent party who discovers the unlawful intention of the other after the contract has

⁹³ *Gas Light and Coke Co. v. Turner* (1839) 5 Bing. N. C. 666, in Ex. Ch. 6 *ib.* 324; 54 R. R. 808 [*Alexander v. Rayson* 1936] 1 K. B. 169; 105 L. J. K. B. 148].

⁹⁴ *Pearce v. Brooks* (1866) L. R. 1 Ex. 213; 35 L. J. Ex. 134.

⁹⁵ *Cannan v. Bryce* (1819) 3 B. & Ald. 179; 22 R. R. 342.

⁹⁶ See now the Gaming Act, 1892 (55 and 56 Vict. c.9.). The Act does not appear to extend beyond invalidating promises to reimburse payments actually made in respect of wagering agreements. There are no words which hit the case of (1) a loan to a person who to the lender's knowledge means to bet and to use the money in paying any bets he loses, or even (2) who to the lender's knowledge means to use the money in paying bets already lost. See A. V. Dicey in L. Q. R. xx, 436; *Re O'Shea* [1911] 2 K. B. 981; 81 L. J. K. B. 70, C. A.

⁹⁷ *Pearce v. Brooks* (1866) L. R. 1 Ex. 213; 35 L. J. Ex. 134.

⁹⁸ *Gas Light and Coke Co. v. Turner* (1839) 5 Bing. N. C. 666, in Ex. Ch. 6 *ib.* 324; 54 R. R. 808.

⁹⁹ *Smith v. White* (1866) L. R. 1 Eq. 626; 35 L. J. Ch. 454.

¹ See note ⁹⁷, *supra*.

² *Ayerst v. Jenkins* (1873) L. R. 16 Eq. 275; 42 L. J. Ch. 690. As to chattels, *contra* per Martin B. in *Pearce v. Brooks* (1866) L. R. 1 Ex. 217; but this seems unsupported: see L. R. 4 Q. B. 311, 315. The sentence in the text is cited from the 9th ed. by Romer L. J. *Alexander v. Rayson* [1936] 1 K. B. 169, 172.

been executed is not entitled to treat the transaction as void and resume possession.³ As with contracts voidable on other grounds, this rule applies, it is conceived, only where an interest in possession has been given by conveyance or delivery. The vendor who has sold goods so as to pass the general property but without delivery, or the lessor who has executed a demise to take effect at a future day, might rescind the contract and stand remitted to his original right of possession on learning the unlawful use of the property designed by the purchaser or lessee.

On the same principle an insurance on a ship or goods is void if the voyage covered by the insurance is to the knowledge of the owner unlawful (which may happen by the omission of the statutory requirements enacted for the protection of seamen and passengers, as well as in the case of trading with enemies or the like). "Where the object of an Act of Parliament is to prohibit a voyage, the illegality attaching to the illegal voyage attaches also to the policy covering the voyage," if the illegality be known to the assured. But acts of the master or other persons not known to the owner do not vitiate the policy, though they may be such as to render the voyage illegal.⁴

AGREEMENTS CONTINUOUS WITH PRECEDENT UNLAWFUL PURPOSE

An agreement may be made void by its connection with an unlawful purpose, though subsequent to the execution of it.

To have that effect, however, the connection must be something more than a mere conjunction of circumstances into which the unlawful transaction enters so that without it there would have been no occasion for the agreement. It must amount to a unity of design and purpose such that the agreement is really part and parcel of one entire unlawful scheme. This is well shown by some cases decided in the Supreme Court of the United States, and spreading over a considerable time. They are the more worth special notice as they are unlike anything in our own books. In *Armstrong v. Toler*⁵ the point, as put by the Court in a slightly simplified form, was this: "A. during a war contrives a plan for importing goods on his own account from the country of the enemy, and goods are sent to B. by the same vessel. A. at the request of B. becomes surety for the payment of the duties [in fact

³ *Feret v. Hill* (1854) 15 C. B. 207; 23 L. J. C. P. 185; 100 R. R. 318, where an interest in realty had passed and the re-entry was forcible; but *semble*, the lease was voidable in equity.

⁴ *Wilson v. Rankin* (1865) L. R. 1 Q. B. 162; 35 L. J. Q. B. 203 (Ex. Ch.); *Dudgeon v. Pembroke* (1874) L. R. 9 Q. B. 581, at 585; 43 L. J. Q. B. 220, per Quain J. and authorities there referred to. Cp. further, on the general head of agreements made with an unlawful purpose, *Hanauer v. Doane* (1870) 2 Wallace, 342. In *Spott v. U. S.* (1874) 20 *ib.* 459, it was held that a buyer of cotton from the Confederate Government, knowing that the purchase-money would be applied in support of the rebellion, could not be recognized by the U. S. Courts as owner of the cotton: *dis.* Field J. on the grounds (which seem right) that it was a question not of contract but of ownership, and that in deciding on title to personal property the *de facto* government existing at the time and place of the transaction must be regarded.

⁵ (1826) 11 Wheaton, 258, 269.

a commuted payment in lieu of confiscation of the goods themselves] which accrue on the goods of B., and is compelled to pay them; can he maintain an action on the promise of B. to return this money?" The answer is that he can, for the "contract made with the government for the payment of duties is a substantive independent contract entirely distinct from the unlawful importation."⁸ But it would be otherwise if the goods had been imported on a joint adventure by A. and B. In *McBlair v. Gibbes*⁹ an assignment of shares in a company was held good as between the parties though the company had been originally formed for the unlawful purpose of supporting the Mexicans against the Spanish Government before the independence of Mexico was recognized by the United States. In *Miltenberger v. Cooke*¹⁰ the facts were these. In 1866 a collector of United States revenue in Mississippi took bills in payment when he ought to have taken coin, his reason being that the state of the country made it still unsafe to have much coin in hand. In account with the government he charged himself and was charged with the amount as if paid in coin. Then he sued the acceptors on the bills, and it was held there was no such illegality as to prevent him from recovering. If the mode of payment was a breach of duty as against the Federal Government, it was open to the Government alone to take any objection to it.

We return to our own Courts for a case where on the other hand the close connection with an illegal design was established and the agreement held bad. In *Fisher v. Bridges*⁶ the plaintiff sued the defendant on a simple covenant to pay money. The defence was that the covenant was in fact given to secure payment of part of the purchase-money of certain leasehold property assigned by the plaintiff to the defendant in pursuance of an unlawful agreement that the land should be resold by lottery contrary to the statute.¹⁰ The Court of Queen's Bench held unanimously that the covenant was good, as there was nothing wrong in paying the money, even if the unlawful purpose of the original agreement had in fact been executed: and the case was likened to a bond given in consideration of past cohabitation. But the Court of Exchequer Chamber unanimously reversed this judgment, holding that the covenant was in substance part of an illegal transaction, whether actually given in pursuance of the first agreement or not. "It is clear that the covenant was given for payment of the purchase-money. It springs from and is a creature of the illegal agreement; and as the law would not enforce the original contract, so neither will it allow the parties to enforce a security for the purchase-money which by the original bargain was tainted with illegality." They

⁸ [The principle is embodied in Restatement of Contracts, § 597. See, too, Williston, Contracts, § 1752.]

⁹ (1873) 18 Wallace, 421.

⁶ (1854) 17 Howard, 232.

¹⁰ (1853-4) 2 E. & B. 118; 22 L. J. Q. B. 270; in Ex. Ch. 3 E. & B. 642; 23 L. J. Q. B. 276; 97 R. R. 701.

¹⁰ Gaming Act, 1739 (12 Geo. 2, c. 28), s. 1.

further pointed out that the case of a bond given for past cohabitation was not analogous, inasmuch as past cohabitation is not an illegal consideration but no consideration at all. But "if an agreement had been made to pay a sum of money in consideration of future cohabitation, and after cohabitation, the money being unpaid, a bond had been given to secure that money, that would be the same case as this; and such a bond could not under such circumstances be enforced."

Some of the language used may have been "vague in itself and dangerous as a precedent."¹¹ The decision, however, does not appear to require anything wider than this—that where a claim for payment of money as on a simple contract would be bad on the ground of illegality, a subsequent security for the same payment, whether given in pursuance of the original agreement or not, is likewise not enforceable: or, more shortly—

5. Any security for the payment of money under an unlawful agreement is itself void, even if the giving of the security was not part of the original agreement.

To this extent at least the principle of *Fisher v. Bridges* has been repeatedly acted on.¹² In *Geere v. Mare*¹³ a policy of assurance was assigned by deed as a further security for the payment of a bill of exchange. The bill itself was given to secure a payment by way of fraudulent preference to a particular creditor, and accepted not by the debtor himself but by a third person. It was held, both on principle and on the authority of *Fisher v. Bridges*, that the deed could not be enforced. Again in *Clay v. Ray*¹⁴ two promissory notes were secretly given by a compounding debtor to a creditor for a sum in excess of the amount of the composition. Judgment was obtained in an action on one of these notes. In consideration of proceedings being stayed and the notes given up a third person gave a guaranty to the creditor for the amount: it was held that on this guaranty no action could be maintained.

It seems doubtful whether this principle would apply to a security for money payable under an agreement of which the performance was not unlawful, though the agreement, on grounds of public policy, were not enforceable.

This is a convenient place to state a rule of a more special kind which has already been assumed in the discussion of various instances of illegality, and the necessity of which is obvious: namely:—

5a. If the condition of a bond is unlawful, the whole bond is void.¹⁵

¹¹ 1 Sm. L. C. i, 436 (12th ed. these words do not appear in the 13th ed.).

¹² *Grane v. Wroughton* (1855) 11 Ex. 146; 24 L. J. Ex. 265; 105 R. R. 456; *Geere v. Mare* (1863) 2 H & C. 339; 33 L. J. Ex. 50; *Clay v. Ray* (1864) 17 C. B. N. S. 188.

¹³ 17 C. B. N. S. 188.

¹⁴ Co. Litt. 206 b, Shepp. Touch. 372; where it is said that if the matter of the condition be only *malum prohibitum*, the obligation is absolute (as if the condition were merely impossible): but this distinction is now clearly not law: see *Duvergier v. Fellows* (1830) 10 B. & C. 826; 34 R. R. 578.

RULES OF EVIDENCE AND PROCEDURE TOUCHING UNLAWFUL
AGREEMENTS

6. (i) The Court will take judicial notice of illegality apparent on the face of an agreement,¹⁵ but a question of illegality dependent on external circumstances must be raised by the pleadings.¹⁶

(ii) Extrinsic evidence is always admissible to show that the object or consideration of an agreement is in fact illegal.

This is an elementary rule established by decisions both at law¹⁷ and in equity.¹⁸ Even a document which for want of a stamp would not be available to establish any right is admissible to prove the illegal nature of the transaction to which it belongs.¹⁹

But where the immediate object of the agreement (in the sense explained above) is not unlawful, we have to bear in mind a qualifying rule which has been thus stated:

6a. "When it is sought to avoid an agreement not being in itself unlawful on the ground of its being meant as part of an unlawful scheme or to carry out an unlawful object, it must be shown that such was the intention of the parties at the time of making the agreement."²⁰

The fact that unlawful means are used in performing an agreement which is *prima facie* lawful and capable of being lawfully performed does not of itself make the agreement unlawful.²¹ This or other subsequent conduct of the parties in the matter of the agreement may be evidence, but evidence only, that a violation of the law was part of their original intention, and whether it was so is a pure question of fact.²² The omission of statutory requisites in carrying on a partnership business is consistent with the contract of partnership itself being lawful; but if it is shown as a fact that there was from the first a secret agreement to carry on the business in an illegal manner, the whole must be taken as one illegal transaction.²³ Again, it is no answer to a claim for an account of partnership profits that there was some collateral breach of the law in the particular transaction in which they were earned.²⁴ Where a duly enrolled deed *inter vivos* purported to create a rent-charge for charitable purposes, but the deed remained in the

¹⁵ *Montefiore v. Menday Co.* [1918] 2 K. B. 241; 87 L. J. K. B. 907.

¹⁶ *North Western Salt Co. v. Electrolytic Alkali Co.* [1914] A. C. 461; 83 L. J. K. B. 530.

¹⁷ *Collins v. Blantern* (1767) 1 Sm. L. C. 406.

¹⁸ *Reynell v. Sprye* (1852) 1 D. M. G. 660, 672; 21 L. J. Ch. 633; 91 R. R. 228, 239, per Knight-Bruce L. J.

¹⁹ *Copple v. Bower* (1838) 4 M. & W. 361; 51 R. R. 627.

²⁰ *Lord Howden v. Simpson* (1839) 10 A. & E. 793, 818; 50 R. R. 555, 573.

²¹ A subsequent agreement to vary the performance of a contract in a way that would make it unlawful is merely inoperative, and leaves the original contract in force: *City of Memphis v. Brown* (1873) 20 Wallace (Sup. Ct. U. S.) 289. Where one party to a contract which could and should have been lawfully performed subjects the other to a penalty by his carelessness, *qu.* as to the conditions which that other must satisfy to be entitled to sue him for an indemnity: *Leslie v. Reliable Adv'tg. Agency* [1915] 1 K. B. 652; 84 L. J. K. B. 719.

²² *Fraser v. Hill* (1853) 1 McQu. 392.

²³ *Armstrong v. Armstrong* (1834) 3 M. & K. 45, 64; 13 L. J. Ch. 101; 41 R. R. 10; s. c. *nom. Armstrong v. Lewis* (1834) in Ex. Ch. 2 Cr. & M. 277, 297.

²⁴ *Sharp v. Taylor* (1849) 2 Ph. 801; 78 R. R. 298. Still less where the illegal acts were done by the partner against whom the account is sought, without the sanction or knowledge of the other: *Thwaites v. Coulthwaite* [1896] 1 Ch. 496; 65 L. J. Ch. 248.

grantor's keeping, no payment was made during his lifetime, nor was the existence of the deed communicated to the persons interested, and the conduct of the parties otherwise showed an understanding that the deed should not take effect till after the grantor's death, it was set aside as an evasion of the Mortmain Act, 1736.²⁵ Again an agreement is not unlawful merely because something remains to be done by one of the parties in order to make the performance of the agreement or of some part of it lawful, such as obtaining a licence from the Crown.²⁶ On the same principle it is not illegal for a highway board to give a licence to a gas company to open a highway within the board's jurisdiction, for it must be taken to mean that they are to do it so as not to create a nuisance.²⁷

In *Waugh v. Morris*²⁸ it was agreed by charter-party that a ship then at Trouville should go thence with a cargo of hay to London, and all cargo was to be brought and taken from the ship alongside. Before the date of the charter-party an Order in Council had been made and published under the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), prohibiting the landing of hay from France in this country. The parties did not know of this, and the master learnt it for the first time on arriving in the Thames. In the result the charterer took the cargo from alongside the ship in the river into another vessel and exported it, as he lawfully might, but after considerable delay. The shipowner sued him for demurrage, and he contended that the contract was illegal (though it had in fact been lawfully performed), as the parties had intended it to be performed by means which at the time of the contract were unlawful, *viz.* landing the hay in the port of London. The Court however refused to take this view. It was true that the plaintiff contemplated and expected that the hay would be landed, as that would be the natural course of things. But the landing was no part of the contract, and if the plaintiff had had before him the possibility of the landing being forbidden, he would probably have expected the defendant not to break the law; as in fact he did not, for no attempt was made to land the goods.

"We quite agree that where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think that in order to avoid a contract which can be legally performed on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so, the knowledge of what the law is becomes of great importance."²⁹

²⁵ [(9 Geo. 2, c. 36) ; its official title is the "Charitable Uses Act"] *Way v. East* (1853) 2 Drew. 44 ; 23 L. J. Ch. 209 ; 100 R. R. 24.

²⁶ *Snwell v. Royal Exch. Assurance Co.* (1813) 4 Taunt. 856 ; *Haines v. Busk* (1814) 5 ib. 521 ; *cp. Porter's case* (1592), 1 Co. Rep. 25 a, the like as to a condition in a devise.

²⁷ *Edgware Highway Board v. Harrow Gas Co.* (1874) L. R. 10 Q. B. 92 ; 44 L. J. Q. B. 1 (1873) L. R. 8 Q. B. 202 ; 42 L. J. Q. B. 57.

²⁸ (1873) L. R. 8 Q. B. 207-8. [Later instances of the application of this dictum are *Nash v. Stevenson Transport, Ltd.* [1936] 2 K. B. 128 ; 105 L. J. K. B. 527 (legal

But on the other hand where an agreement is *prima facie* illegal, it lies on the party seeking to enforce it to show that the intention was not illegal. It is not enough to show a mere possibility of the agreement being lawfully performed in particular contingent events. "If there be on the face of the agreement an illegal intention, the burden lies on the party who uses expressions *prima facie* importing an illegal purpose to show that the intention was legal."³⁰

RECOVERING BACK MONEY OR PROPERTY

We now come to the rule, which we will first state provisionally in a general form, that money or property paid or delivered under an unlawful agreement cannot be recovered back.

This rule (which is subject to exceptions to be presently stated) is the chief part, though not quite the whole, of what is meant by the maxim, *In pari delicto potior est conditio defendentis*." To some extent it coincides with the more general rule that money voluntarily paid with full knowledge of all material facts cannot be recovered back. However, the principle proper to this class of cases is that persons who have entered into dealings forbidden by the law must not expect any assistance from the law, save so far as the simple refusal to enforce such an agreement is unavoidably beneficial to the party sued upon it. As it is sometimes expressed, the Court is neutral between the parties. The matter is thus put by Lord Mansfield:

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which defendant has the advantage of contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*."³¹

The test for the application of the rule is whether the plaintiff

performance impossible), and *Hindley & Co., Ltd. v. General Fibre Co., Ltd.* [1940] 2 K. B. 517; 109 L. J. K. B. 857.]

³⁰ *Holland v. Hall* (1817) 1 B. & Ald. 53; 18 R. R. 428, per Abbott, J.; *Allkins v. Jope* (1877) 2 C. P. D. 375; 46 L. J. C. P. 824. The same principle is expressed in a different form by Paulus: "Item quod leges fieri prohibent, si perpetuam causam servaturum est, cessat obligatio . . . quamquam etiam si non sit perpetua causa . . . idem dicendum est, quia statim contra mores sit": D. 45, 1 de v. o. 35, § 1.

³¹ Cp. D. 50, 17, de reg. iuris, 154, C. 4, 7, de conduct. ob turpem causam, 2.

³² *Holman v. Johnson* (1775) Cowp. 341, 343.

can make out his case otherwise than "through the medium and by the act of an illegal transaction to which he was himself a party."³³ In an action brought to recover back premiums paid on policies of life insurance alleged to be void for want of insurable interest, it was held that, assuming them to be so, the position of the parties was equal even though the assured had relied on a mistaken statement of the law made in good faith by the insurance company's agent, and the premiums could not be recovered.³⁴ The rule is not confined to the case of actual money payments, though that is the most common. Where the plaintiff had deposited the half of a bank note with the defendant by way of pledge to secure the repayment of money due for wine and suppers supplied by the defendant in a brothel and disorderly house kept by the defendant for the purpose of being consumed there in a debauch, and for money lent for similar purposes, it was held that the plaintiff could not recover, as it was necessary to his case to show the true character of the deposit.³⁵

The rule is not even confined to causes of action *ex contractu*. An action in tort cannot be maintained when the cause of action springs from an illegal transaction to which the plaintiff was a party, and that transaction is a necessary part of his case.³⁶

Independently of the special grounds of this rule, a completely executed transfer of property, though originally made upon an unlawful consideration or in pursuance of an unlawful agreement, is afterwards valid and irrecoverable.³⁷

The rule is not applicable in the following classes of cases, most of which, however, cannot properly be called exceptions.

An agent is not discharged from accounting to his principal by reason of past unlawful acts or intentions of the principal collateral to the matter of the agency. If A. pays money to B. for the use of C., B. cannot justify a refusal to pay over to C. by showing that it was paid under an unlawful agreement between A. and C.³⁸ Again, if A. and B. make bets at a horse-race on a joint account and B. receives the winnings, A. can recover his share of the money or sue on a bill given to him by B. for it: here indeed there is no

³³ *Taylor v. Chester* (1869) L. R. 4 Q. B. 309, 314; 38 L. J. Q. B. 225.

³⁴ *Harse v. Pearl Life Assurance Co.* [1904] 1 K. B. 558; 73 L. J. K. B. 373, C. A. Otherwise if the statement had been fraudulent, see per Collins M.R. [1904] 1 K. B. at 563.

³⁵ *Taylor v. Chester*, note ³³. This is apparent by the course of the pleadings; the declaration was on a bailment of the half-note to be re-delivered on request, and in detinue. Pleas, in effect, that it was deposited by way of pledge to secure money due. Replication, the immoral character of the debt as above. The Court inclined also to think, but did not decide, that the plaintiff's case must fail on the more general ground that the delivery of the note was an executed contract by which a special property passed, and that such property must remain. Compare *Ex parte Caldecott* (1876) 4 Ch. Div. 150; 46 L. J. Bk. 14, p. 369; *Begbie v. Phosphate Sewage Co.* (1875) L. R. 19 Q. B. 491, 500, affd. in C. A. 1 Q. B. Div. 679.

³⁶ *Fivaz v. Nicholls* (1846) 2 C. B. 501, 513; 15 L. J. C. P. 125; 69 R. R. 514, a peculiar and apparently solitary example.

³⁷ *Ayerst v. Jenkins* (1873) L. R. 16 Eq. 275; 42 L. J. Ch. 690. Cp. *M'Cullan v. Mortimer* (1842) (Ex. Ch.) 9 M. & W. 696.

³⁸ *Tenant v. Elliott* (1797) 1 B. & P. 3; 4 R. R. 755.

illegality in the proper sense.³⁹ For the same reason an agent employed to bet and collect winnings is bound to account to his principal for what he collects, though the losers could not have been compelled to pay.⁴⁰ But, by statute, such an agent cannot recover from his principal either any money paid by him in respect of losses or any reward or commission for his services; nor can one who pays bets at the loser's request recover the money, whether he was employed in making the bets or not.⁴¹ In like manner the right to an account of partnership profits is not lost by the particular transaction in which they were earned having involved a breach of the law.⁴² Nor can a trustee of property refuse to account to his *cestui que trust* on grounds of this kind: a trust was enforced where the persons interested were the members of an unincorporated trading association, though it was doubtful whether the association itself was not illegal.⁴³ So, if A. with B.'s consent effects a policy for his own benefit on the life and in the same name of B., having himself no insurable interest, the policy and the value of it belong, as between them, to A.⁴⁴ If a man entrusts another as his agent with money to be paid for an unlawful purpose, he may recover it at any time before it is actually so paid; or even if the agent does pay it after having been warned not to do so;⁴⁵ the reason is that whether the intended payment be lawful or not an authority may always be countermanded as between the principal and agent so long as it is not executed.⁴⁶ It is the same where the agent is authorized to apply in an unlawful manner any part of the

³⁹ *Johnson v. Lansley* (1852) 12 C. B. 468; 92 R. R. 766. And where B. uses moneys of his own and A.'s in betting, on the terms of dividing winnings in certain proportions, A. can sue B. on a cheque given for his share of winnings: *Beeston v. Beeston* (1875) 1 Ex. D. 13; 45 L. J. Ex. 230. *Quære* whether either of these cases is touched by the Gaming Act, 1892. Cp. and dist. *Higginson v. Simpson* (1877) 2 C. P. D. 76; 46 L. J. C. P. 192, where the transaction in question was held to be in substance a mere wager. A fine distinction has been taken in two cases of purchase of bank shares through brokers, where the contract note omitted to specify the numbers of the shares as required by Leaman's Act, 30 & 31 Vict. c. 29, s. 1. [official title, "Banking Companies (Shares) Act."] The brokers, if they had not completed the contracts, might have been declared defaulters and expelled from the Stock Exchange. In *Seymour v. Bridge* (1885) 14 Q. B. D. 460, Mathew J. held that the principal could not repudiate; in *Perry v. Barnett* (1885) 15 Q. P. Div. 388; 54 L. J. Q. B. 466, it was held that, if he did not know the usage of the Stock Exchange he could.

⁴⁰ *Bridger v. Savage* (1884) 15 Q. B. 363; 54 L. J. Q. B. 464; the contract of agency is not a gaming or wagering contract. This does not seem to be affected by the Gaming Act, 1892. But he cannot be liable for failing to make bets or collect winnings, for the collection is precarious: *Cohen v. Kittell* (1889) 22 Q. B. D. 681; 58 L. J. Q. B. 241.

⁴¹ The Gaming Act, 1892, 55 Vict. c. 9, amending 8 & 9 Vict. c. 109, as interpreted (*qu. whether rightly*) by *Read v. Anderson* (1884) 13 Q. B. Div. 779; 53 L. J. Q. B. 532; *Tatam v. Reeve* [1893] 1 Q. B. 44; 62 L. J. Q. B. 30. *Semble* the plaintiff could not recover even if he did not know that the payments he made at the defendant's request were for bets. The Act is not retrospective: *Knight v. Lee* [1893] 1 Q. B. 41; 62 L. J. Q. B. 28.

⁴² *Sharp v. Taylor* (1849) 2 Ph. 801. Of course it is not so where the main object of the partnership is unlawful: *Thwaites v. Coulthwaite* [1896] 1 Ch. 496; 65 L. J. Ch. 298.

⁴³ *Sheppard v. Oxenford* (1885) 1 K. and J. 491; 103 R. R. 203.

⁴⁴ *Worthington v. Curtis* (1875) 1 Ch. Div. 419; 45 L. J. Ch. 259.

⁴⁵ *Hastelow v. Jackson* (1828) 8 B. and C. 221, 226; 32 R. R. 369, 373.

⁴⁶ *Bone v. Ekless* (1860) 5 H. & N. 925; 29 L. J. Ex. 438; 120 R. R. 896.

moneys to be received by him on account of the principal; he must account for so much of that part as he has not actually paid over." The language of the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18. which says that no money can be recovered "which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made" does not prevent either party from repudiating the wager at any time either before or after the event and before the money is actually paid over and recovering his own deposit from the stakeholder.⁴⁷ Also it does not apply to money or other valuables deposited by way of security or "cover" for performance of a wagering agreement.⁴⁸

*[Where money has been paid or goods have been delivered or land has been transferred under an unlawful agreement, the money or the goods or the land may be recovered back,⁴⁹ subject to the following conditions:—

(1) The unlawfulness of the agreement must not involve any considerable moral turpitude. "If," said Lord Mansfield in *Smith v. Bromley*,⁵⁰ "the act is in itself immoral, or a violation of the general laws of public policy, there, the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is, *potior est conditio defendentis*."⁵¹ This dictum has been repeatedly followed in later cases,⁵² and the principle upon which it rests is that the Courts will not allow their procedure to be abused. Lord Mansfield's test is rather vague, but the decisions indicate on the one hand that not every criminal offence exhibits grave moral turpitude, and on the other hand that it may be present even where no crime is contemplated or committed.

(2) Where the unlawful purpose, or any material or substantial part of it has been carried into effect, the law allows no *locus poenitentiae*.⁵³ In *Taylor v. Bowers*,⁵⁴ A. had delivered goods to B.

⁴⁶ See page 343.

⁴⁷ *Diggle v. Higgs* (1877) 2 Ex. Div. 422; 46 L. J. Ex. 721; *Hampden v. Walsh* (1876) 1 Q. B. D. 189; 45 L. J. Q. B. 238, where former authorities are collected and considered: *Trimble v. Hill* (1879) (J. C.) on a colonial statute in the same terms, 5 App. Ca. 342; 49 L. J. P. C. 49. Cp. *Barclay v. Pearson* [1893] 2 Ch. 154. This is not affected by the Gaming Act, 1892: *O'Sullivan v. Thomas* [1895] 1 Q. B. 698, 64 L. J. Q. B. 398; *Shoolbred v. Roberts* [1899] 2 Q. B. 560; 68 L. J. Q. B. 998, confirmed by C. A. in *Burge v. Ashley and Smith* [1900] 1 Q. B. 744; 69 L. J. Q. B. 538.

⁴⁸ *Universal Stock Exchange, Ltd. v. Strachan* (No. 1) [1896] A. C. 166; 65 L. J. Q. B. 428.

⁴⁹ *Tappenden v. Randall* (1801) 2 B. & P. 467 (money); *Taylor v. Bowers* (1876) 1 Q. B. D. 291; 45 L. J. Q. B. 163 (goods); *Symes v. Hughes* (1870) L. R. 9 Eq. 475; 39 L. J. Ch. 304 (land).⁵⁰ [(1760) 2 Doug. 441, 443.]

⁵¹ [The same idea was expressed in various ways by the judges in *Tappenden v. Randall* (1801) 2 B. & P. 467.]

⁵² [Collected in 12 English and Empire Digest, 281—282. See, too, *Bowmakers, Ltd. v. Barnett Instruments, Ltd.* [1945] K. B. 65, 72.]

⁵³ [*Taylor v. Bowers* (1876) 1 Q. B. D. 291, 300; 45 L. J. Q. B. 163; *Herman v. Teuchner* (1885) 15 Q. B. D. 561; 54 L. J. Q. B. 340; *Kearley v. Thompson* (1890) 24 Q. B. D. 742, 746—747; 59 L. J. Q. B. 288; *Alexander v. Rayson* [1936] 1 K. B. 169, 190; 105 L. J. K. B. 148; *Berg v. Sadler & Moore* [1937] 2 K. B. 158, 165; 106 L. J. K. B. 593.]⁵⁴ [(1876) 1 Q. B. D. 291; 45 L. J. Q. B. 163.]

* [The author's original paragraph has been rewritten in view of decisions since the last edition and of some uncertainties in the law.]

under a fictitious assignment for the purpose of defrauding A.'s creditors. B. executed a bill of sale of the goods to C., who was privy to the scheme, without A.'s assent. It was held that A. might repudiate the whole transaction and demand the return of the goods from C. In *Symes v. Hughes*,⁵⁵ a case somewhat of the same kind, the plaintiff had assigned certain leasehold property to a trustee with the intention of defeating his creditors; afterwards under an arrangement with his creditors he sued for the recovery of the property, having undertaken to pay them a composition in case of success. The Court held that, as the illegal purpose had not been executed, he was entitled to a reconveyance. It will be observed, however, that the plaintiff was in effect suing as a trustee for his creditors, so that the real question was whether the fraud upon the creditors should be continued as against the better mind of the debtor himself.

What constitutes a material or substantial part of the agreement, for the purposes of this section, must necessarily be a question of construction of the particular agreement in each case. Two illustrations have been given above, but other cases show that, even allowing for the variations inevitable in the interpretation of different agreements, some of the decisions are difficult to reconcile.⁵⁶ Other cases, again, show a lenient view of what is "partial" performance of the agreement and are barely consistent with condition (1).⁵⁷ However, the tendency of recent decisions is towards a more stringent application of condition (2).

(3) The Courts will not countenance any attempt to enforce the unlawful agreement,⁵⁸ and this prohibition extends to an intention to use for an unlawful purpose the documents containing the agreement.⁵⁹ The plaintiff cannot succeed if he seeks to rely upon the terms of the agreement. Indeed, his action cannot be based on contract at all, but must be quasi-contractual, *e.g.*, for money had and received, or in detinue or in some other form appropriate to the recovery of property.⁶⁰

(4) The plaintiff must be given previous notice that he repudiates the agreement and seeks recovery of the property.⁶¹

The cases mentioned above (pp. 342-344) as to recovering money from agents or stakeholders are also put partly on the grounds of recovery of property before a substantial part of the

⁵⁵ [(1870) L. R. 9 Eq. 475; 39 L. J. Ch. 304.]

⁵⁶ [Cf. *Bone v. Ekless* (1860) 5 H. & N. 925; 29 L. J. Ex. 438, with *Apthorp v. Neville & Co.* (1907) 23 T. L. R. 575; and *Petherjermal Chetty v. Muniandy Servai* (1908) 24 T. L. R. 462, with *Alexander v. Rayson* [1936] 1 K. B. 169, 190 (ineffectual attempt to defraud in each case).]

⁵⁷ [*Chappell v. Poles* (1897) 2 M. & W. 867, and *Bone's case* and *Chetty's case*, cited in note ⁵⁶.]

⁵⁸ [*Collins v. Blantern* (1767) 2 Wils. K. B. 341, 350; *Taylor v. Bowers* (1876) 1 Q. B. D. 291, 300; 45 L. J. Q. B. 163.]

⁵⁹ [*Alexander v. Rayson* [1936] 1 K. B. 169; 105 L. J. K. B. 158.]

⁶⁰ [*Berg v. Sadler & Moore* [1937] 2 K. B. 158; 106 L. J. K. B. 593. In *Bowmakers, Ltd. v. Barnet Instruments, Ltd.* [1945] K. B. 65, the plaintiff's claim in an action for conversion was successful.]

⁶¹ [*Palyart v. Leckie* (1817) 6 M. & S. 290; 18 R. R. 381.]

unlawful purpose has been carried out; this, however, does not seem necessary to them.⁶²

In certain cases the parties are said not to be *in pari delicto*, particularly where the unlawful agreement and the payment take place under circumstances practically amounting to coercion. The chief instances of this kind in courts of law have been payments made by a debtor by way of fraudulent preference to purchase a particular creditor's assent to his discharge in bankruptcy or to a composition. The leading modern case is *Atkinson v. Denby*.⁶³ There the defendant, one of plaintiff's creditors, refused to accept the composition unless he had something more, and the plaintiff paid him 50*l.* before he executed the composition deed. It was held that this money could be recovered back. "It is true," said the Court of Exchequer Chamber, "that both are *in delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has the power to dictate, the other no alternative but to submit." On the same ground money paid for compounding a penal action contrary to the statute of Elizabeth may be recovered back.⁶⁴ But where a bill is given by way of fraudulent preference to purchase a creditor's assent to a composition, and after the composition the debtor chooses to pay the amount of the bill, this is a voluntary payment which cannot be recovered.⁶⁵

In equity the application of this doctrine has been the same in substance, though more varied in its circumstances. The rule followed by courts of equity was thus described by Knight Bruce L.J.: "Where the parties to a contract against public policy or illegal are not *in pari delicto* (and they are not always so) and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities, of which *Osborne v. Williams* [see below] is one."⁶⁶

On this principle relief was given and an account decreed in *Osborne v. Williams*,⁶⁷ where the unlawful sale of the profits of an office was made by a son to his father after the son had obtained the office in succession to his father and upon his recommendation, so that he was wholly under his father's control in the matter. In *Reynell v. Sprye*⁶⁸ an agreement bad for champerty was set aside

⁶² *Hastelow v. Jackson* (1828) 8 B. & C. 221 ; 32 R. R. 369 ; *Mearing v. Hellings* (1845) 14 M. & W. 711 ; 15 L. J. Ex. 168, where that case was doubted, decides only this : a man cannot sue a stakeholder for the whole of the sweepstakes he has won in a lottery, and then reply to the objection of illegality that if the whole thing is illegal he must at all events recover his own stake. *Allegans contraria non est audiendus*.

⁶³ (1861) 6 H. & N. 778 ; 30 L. J. Ex. 361, in Ex. Ch. 7 H. & N. 934 ; 31 L. J. Ex. 362 ; 123 R. R. 824, 835 ; the chief earlier ones are *Smith v. Bromley* (1760) 2 Doug. 695 ; *Smith v. Cuff* (1817) 6 M. & S. 160 ; 18 R. R. 340.

⁶⁴ *Williams v. Hedley* (1807) 8 East, 378 ; 9 R. R. 473.

⁶⁵ *Wilson v. Ray* (1839) 10 A. & E. 82 ; 50 R. R. 341.

⁶⁶ *Reynell v. Sprye* (1852) 1 D. M. G. 660, at 679 ; 91 R. R. 228, 244.

⁶⁷ (1811) 18 Ves. 379 ; 11 R. R. 218.

⁶⁸ (1852) 1 D. M. G. 660 ; 91 R. R. 228.

at the suit of the party who had been induced to enter into it by the other's false representations that it was a usual and proper course among men of business to advance costs and manage litigation on the terms of taking all the risk and sharing the property recovered. In a later case a mortgage to secure a loan of money which in fact was lent upon an immoral consideration was set aside at the suit of the borrower on the ground that the interest of others besides parties to the corrupt bargain was involved.⁶⁹ A wider exception is made as we have seen above, in the case of agreements of which the consideration is future illicit cohabitation between the parties. Apart from this particular class of cases, it is submitted that the rule and its qualifications may be stated to this effect:

7. Money paid or property delivered under an unlawful agreement cannot be recovered back, nor the agreement set aside at the suit of either party—

unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself (and the agreement is not positively criminal or immoral?);

or unless the agreement was made under such circumstances as between the parties that if otherwise lawful it would be voidable at the option of the party seeking relief⁷⁰ and the performance would not on the face of it be contrary to law or public policy;⁷¹

or, in the case of an action to set aside the agreement, unless in the judgment of the Court the interests of third persons require that it should be set aside.

8. Where a difference of local laws is in question, the lawfulness of a contract is to be determined by the law governing the substance of the contract.⁷²

Exception 1—An agreement entered into by a citizen in viola-

⁶⁹ *W. v. B.* (1863) 32 Beav. 574; 138 R. R. 874.

⁷⁰ This form of expression seems justified by *Harse v. Pearl Life Assurance Co.*, p. 342.

⁷¹ *Parkinson v. College of Ambulance* [1925] 2 K. B. 1; 93 L. J. K. B. 1066.

⁷² According to our modern authorities (see especially *Hamlyn & Co. v. Talisker Distillery* [1894] A. C. 202) the question is really by what law the parties intended the contract to be governed: Dicey, *Conflict of Laws*, 628. [Cf. *Cheshire, Private International Law* (2nd ed. 1938). See, too, *R. v. International Trustee, &c.* [1937] A. C. 500; 106 L. J. K. B. 236; *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.* [1939] A. C. 277, 289—290; 108 L. J. P. C. 40.] The auxiliary rules for ascertaining that intention, and so fixing the "proper law of the contract," which, however, are presumptions, and not fixed rules of law, are that "the proper law of a contract is indeed *prima facie* the law of the country where it is made (*lex loci contractus*)";—see *British S. Africa Co. v. De Beers Consolid. Mines* [1910] 1 Ch. 354, 381, 382; 79 L. J. Ch. 345, affirmed [1910] 2 Ch. 502, C. A. "—yet when a contract is made in one country, but is wholly or partially to be performed in another, then great weight will be given to the law of the place of performance (*lex loci solutionis*), as being probably the proper law of the contract, in regard, at any rate, to acts to be done there": Dicey, *op. cit.* 565. The framing of a contract in terms exclusively appropriate to a particular system of law is a strong indication of intention to make that the governing law. [So is an expression of intention that a particular system of law shall apply to the contract, provided the intention expressed is *bona fide* and legal and is not contrary to public policy: *Vita Food Products case* (*supra*). Cf. L. Q. R. lvi, 320—339 (1940).] For American judicial doctrines, among which there is still great divergence, see Prof. Joseph H. Beale's articles in *Harv. Law Rev.* xxiii, 79, 194.

tion of a prohibitory law of his own state cannot in any case be enforced in any court of that state.

Exception 2—An agreement contrary to common principles of justice or morality, or to the interests of the state, cannot in any way be enforced.

What we here have to do with is in truth a fragment of a much larger subject, namely, the consideration of the local law governing obligations in general.⁷³

The main proposition is well established, and it would be idle to attempt in this place any abridgment or restatement of what is said upon it by writers on the Conflict of Laws. The first exception is a simple one. The municipal laws of a particular state, especially laws of a prohibitory kind, are as a rule directed only to things done within its jurisdiction. But a particular law may positively forbid the subjects of the state to undertake some particular class of transactions in any part of the world: and where such a law exists, the courts of that state must give effect to it.⁷⁴ A foreigner cannot sue in an English court on a contract made with a British subject, and itself lawful at the place where it was made, if it is such that British subjects are forbidden by Act of Parliament to make it anywhere.⁷⁵ It may be doubted whether such a contract would be recognized even by the courts of the state where it was made, unless the prohibition were of so hostile or restrictive a character as between the two states as not to fall within the ordinary principles of comity (*e.g.*, if the rulers of a people skilled in a particular industry should forbid them to exercise or teach that industry abroad). The authorities already cited (pp. 266-267) as to marriages within the prohibited degrees contracted abroad by British subjects may also be usefully consulted as illustrating this topic.

The second exception is by no means free from difficulties touching its real meaning and extent.⁷⁶ There is no doubt that an agreement will not necessarily, though it will generally, be enforced if lawful according to its proper local law. The reasons for which the court may nevertheless refuse to enforce it have been variously expressed by judges and text-writers, and sometimes in very wide language.

⁷³ For the treatment of it in this connexion, see Savigny, *Syst.* 8, 269—276 (§ 374 C.); Story, *Conflict of Laws*, §§ 243 *sqq.*, 258 *sqq.*; Dicey, *op. cit.* chaps. 24, 25. Westlake, *Priv. Intern. Law*, 3rd ed. 259, 260, states the rules thus: Where a contract contemplated the violation of English law, it cannot be enforced here, notwithstanding that it may have been valid by its proper law. Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here, notwithstanding that it may have been valid by its proper law.

⁷⁴ [But that will not prevent an English Court from giving effect to the contract if it is to be performed in England and is not contrary to English law: *Kleinwort & Co. v. Ungarische, &c. Aktiengesellschaft* [1939] 2 K. B. 678; 108 L. J. K. B. 861.]

⁷⁵ *Santos v. Illidge* (1860) in Ex. Ch., 8 C. B. N. S. at 874; 29 L. J. C. P. at 350; 52 R. R. 928, per Blackburn J.

⁷⁶ "Whether an action can be supported in England on a contract which is void by the law of England, but valid by the law of the country where the matter is transacted, is a great question": per Wilmot J. *Robinson v. Bland* (1760) 2 Burr. 1083.

It may be taken for granted that the courts of a civilized state cannot give effect to rights alleged to be valid by some local law, but arising from a transaction plainly repugnant to the *ius gentium* in its proper sense—the principles of law and morality common to civilized nations. In other words a local law cannot be recognized, though otherwise it would be the proper law to look to, if it is in derogation of all civilized laws.⁷⁷ This indeed seems a fundamental assumption in the administration of justice, in whatever forum and by whatever procedure. Likewise it is clear that no court can be bound to enforce rights arising under a system of law so different from its own, and so unlike anything it is accustomed to, that not only its administrative means, but the legal conceptions which are the foundation of its procedure, and its legal habit of mind,⁷⁸ so to speak, are wholly unfitted to deal with them. For this reason the English Divorce Court cannot entertain a suit founded on a Mormon marriage. Apart from the question whether such marriages would be regarded by our courts as immoral *iure gentium*,⁷⁹ the matrimonial law of England is wholly inapplicable to polygamy, and the attempt to apply it would lead to manifest absurdities.⁸⁰ Practically these difficulties can hardly arise except as to rights derived from family relations. One can hardly imagine them in the proper region of contracts.

Again, judicial observations are to be found which go to the further extent of saying that no court will enforce anything contrary to the particular views of justice, morality or policy whereon its own municipal jurisprudence is founded. And this doctrine is supported by the general acceptance of text-writers, which in this department of law must needs count for more than in any other, owing to its comparative poverty in decisive authorities. But a test question is to be found in the treatment of rights arising out of slavery by the courts of a free country: and for England at least the decision of the Exchequer Chamber in *Santos v. Illidge*⁸¹ gave such an answer to it as makes the prevailing opinion of the books very doubtful. Slavery is as repugnant to the principles of modern English law as anything can well be which has been so far admitted by any other civilised system that any serious question of the conflict of laws could arise upon it. There is no doubt that neither the status of slavery nor any personal right of the master or duty of

⁷⁷ It has been laid down that contracts to bribe or corruptly to influence officers of a foreign government—even if not prohibited by the law of that government—will not be enforced in the courts of the United States: *Oscanyan v. Arms Co.*, 103 U. S. 261, 277; and this not in the interest of the foreign government, but for the sake of morality and the dignity of law at home.

⁷⁸ In German one might speak without any strangeness of the *Rechtsbewusstsein* of the Court.

⁷⁹ That is, among Western nations. The recognition of Hindu and Mahometan law in British India (where moreover polygamy is in fact exceptional) stands on wholly different ground.

⁸⁰ *Hyde v. Hyde and Woodmansee* (1866) L. R. 1 P. & D. 130; 35 L. J. Mat. 57.

⁸¹ (1860) 8 C. B. N. S. 861; 29 L. J. C. P. 348; 125 R. R. 919, reversing s. c. in court below, 6 C. B. N. S. 841; 28 L. J. C. P. 317; 120 R. R. 407.

the slave incident thereto can exist in England,⁸² or within the protection of English law.⁸³ But it long remained uncertain how an English court would deal with a contract concerning slaves which was lawful in the country where it was made and to be performed. Passing over earlier and indecisive authorities,⁸⁴ we find Lord Mansfield assuming that a contract for the sale of a slave may be good here.⁸⁵ On the other hand, Best J. thought no action "founded upon a right arising out of slavery" would be maintainable in the municipal courts of this country.⁸⁶ In *Santos v. Illidge*⁸⁷ a Brazilian sued an English firm trading in Brazil for the non-delivery of slaves under a contract for the sale of them in that country, which was valid by Brazilian law. The only question discussed was whether the sale was or was not under the circumstances made illegal by the operation of the statutes against slave trading: and in the result the majority of the Exchequer Chamber held that it was not. It was not even contended (though the point was marked for argument) that at common law the Court must regard a contract for the sale of slaves as so repugnant to English principles of justice that, wherever made, it could not be enforced in England. But in *Kaufman v. Gerson*⁸⁸ the Court of Appeal refused to enforce an agreement for compounding a criminal offence made in France between parties domiciled there, and valid by the law of France. The Court went on the ground that the agreement was obtained by duress, but on the facts as reported it is hard to see what duress there was beyond fear of the prosecution itself. Unless we may understand that the transaction was really mere blackmailing, it is not easy to reconcile the decision with *Santos v. Illidge*, which is of equal authority. More lately *Santos v. Illidge* has been treated by very learned members of the House of Lords as being only a case of construction decided on a particular statute.⁸⁹ However this may be, the earlier cases in which the *dicta* relied upon for the wider doctrine have occurred have in fact been almost always determined on considerations of local law, and in particular of the law of the place where the contract was to be performed.

Thus in *Robinson v. Bland*⁹⁰ the plaintiff sued (1) upon a bill of exchange drawn upon England to secure money won at play in France; (2) for money won at play in France; (3) for money lent

⁸² *Sommersett's case* (1771-2) 20 St. T. 1. But in fact English opinion was still unsettled for many years later: see E. Fiddes, "Lord Mansfield and the *Sommersett case*," L. Q. R. 50, 499 (1934).

⁸³ *Viz.* on board an English ship of war on the high seas or in hostile occupation of territorial waters: *Forbes v. Cochrane* (1824) 2 B. & C. 448; 26 R. R. 402.

⁸⁴ They are collected in Hargrave's argument in *Sommersett's case*. ⁸⁵ 20 St. Tr. 79.

⁸⁶ *Forbes v. Cochrane* (1824) 2 B. & C. at 469; 26 R. R. 418. To same effect, *Story*, § 259, in spite of American authority being adverse.

⁸⁸ [1904] 1 K. B. 591; 73 L. J. K. B. 320, and see Dicey, *Conflict of Laws*, 882, 883. "Are we to believe that compounding an offence is more obviously contrary to universal justice than slave-trading?"

⁸⁹ *Dynamit Aktien-Gesellschaft v. Rio Tinto Co.* [1918] A. C. 292, per Lord Atkinson at 299, Lord Parker of Waddington at 302.

⁹⁰ (1760) 2 Burr. 1077; 1 W. Bl. 234.

for play at the same time and place. As to the bill, it was held to be an English bill; for the contract was to be performed by payment in England, and therefore to be governed by English law. For the money won, it could not have been recovered in a French court of justice,⁹¹ and so could not in any case be sued for here; but as to the money lent, the loan was lawful in France and therefore recoverable here. Wilmot J. said that an action could be maintained in some countries by a courtesan for the price of her prostitution, but certainly would not be allowed in England, though the cause of action arose in one of those countries. Probably no such local law now exists. But if it did, and if it were attempted to enforce it in our courts, we could appeal, not to our own municipal notions of morality, but to the Roman law as expressing the common and continuous understanding of civilized nations. Such a bargain is immoral *iure gentium*.

In *Quarrier v. Colston*⁹² it was held that money lent by one English subject to another for gaming in a foreign country where such gaming was not unlawful might be recovered in England. This, as well as the foregoing case, is not inconsistent with the rule that the law of the place of performance is to be followed. It must be taken, no doubt, that the parties contemplated payment in England. Then, what says the law of England? Money lent for an unlawful use cannot be recovered. Then, was this money lent for an unlawful use? That must be determined by the law existing at the time and place at which the money was to be used in play. That law not being shown to prohibit such a use of it, there was no unlawful purpose in the loan, and there was a good cause of action, not merely by the local law, which in fact was not before the Court,⁹³ but by the law of England. These cases do show, however, that the English law against gaming is not considered to be founded on such high and general principles of morality that it is to override all foreign laws, or that an English court is to presume gaming to be unlawful by a foreign law,⁹⁴ such a view seems indeed to be untenable since the Betting and Lotteries Act, 1934 (24 & 25 Geo. 5, c. 58), has expressly though subject to restrictions, allowed bookmaking and totalisators. Never-

⁹¹ Nor, under the circumstances, in the marshal's court of honour which then existed; but it seems the court would in any case have declined to take notice of an extraordinary and extra-legal jurisdiction of that sort.

⁹² (1842) 1 Ph. 147; 65 R. R. 351. Nothing was said about the Gaming Act of 1835 (8 & 9 Vict. c. 109).

⁹³ The local law might conceivably without making gaming unlawful, reduce debts for money lent at play to the rank of natural obligations or debts of honour not enforceable by legal process: if the view in the text be correct, the existence of such a law would make no difference in the English court.

⁹⁴ Savigny held that laws relating to usury and gaming must be reckoned strictly compulsory (*von streng positiver, zwingender Natur*)—i.e. must be applied without regard to local law by every court within their allegiance, but are not to be regarded by any court outside it: Syst. 8. 276. The old usury laws were without doubt supposed to express the dictates of universal Christian morality. Some of the judgments in the recent English cases mentioned above seem influenced by a view like Savigny's.

theless it is now held that no action lies on an English cheque given in repayment of money lent for gaming in France, such gaming not being unlawful there, and the consideration for the cheque being valid by French law. This appears to involve the doctrine that the Gaming Acts, so far as they invalidate securities given in respect of gaming debts, apply to gaming in all parts of the world and without any reference to the local law. For otherwise it does not appear how anything in the English Acts was material in the case.⁹⁵ Still later the actual decision in *Quarrier v. Colston* has been unanimously confirmed by a Court of Appeal differently constituted.⁹⁶ The resulting state of our law, whatever virtues it may have, has not that of simplicity. A recent judicial summary is as follows: "One finds that the law is in this curious condition: that where the game is played in a foreign country in which it is lawful then the decisions on foreign gaming apply and the money can be sued for in the courts of this country, but where the game is to be played in this country the weight of opinion is in favour of the view that the money cannot be sued for here because the statute of Anne avoids not only the security but by implication the consideration also. This state of the authorities is not very satisfactory."⁹⁷

In *Hope v. Hope*⁹⁸ an agreement made between a husband and wife, British subjects domiciled in France, provided for two things which made the agreement void in an English court: the collusive conduct of a divorce suit in England, and the abandonment by the husband of the custody of his children. It is worth noting that at the time of the suit the husband was resident in England, and it does not seem clear that he had not recovered an English domicile. Knight Bruce L.J. put his judgment partly on the ground that an important part at least of the provisions of the document was to be carried into effect in England. Turner L.J. did say in general terms that a contract must be consistent with the laws and policy of the country where it is sought to be enforced, and he appears to have thought the provision as to the custody of the children was one that an English court must absolutely refuse to enforce, whether to be performed in England or not, and whether by a

⁹⁵ *Moulis v. Owen* [1907] 1 K. B. 746 ; 76 L. J. K. B. 396, C. A., followed by a Divisional Court in *Carlton Hall Club v. Lawrence* [1929] 2 K. B. 153 ; 98 L. J. K. B. 305. See the dissenting judgment of Fletcher Moulton L.J. and Mr. Dicey's notes in L. Q. R. xxxiii. 249, and Conflict of Laws, 532, 548. *Robinson v. Bland* was not a similar case for there the money lost was distinctly stated not to be recoverable in France. On the other hand the only report of *King v. Kemp* (1863, *coram* Willes J., relied on by Fletcher Moulton L.J.) 8 L. T. 255, is so meagre as to be hardly intelligible. *Quarrier v. Colston* was distinguished by the majority of the Court (Collins M.R. and Cozens-Hardy L.J.) on the ground that there the action was not on a security but on the original consideration ; and this appears to be accepted in *Saxby v. Fulton* (next note).

⁹⁶ *Saxby v. Fulton* [1909] 2 K. B. 208 ; 78 L. J. K. B. 781 (Vaughan Williams, Buckley and Kennedy L.J.).

⁹⁷ *Shearman J.* in *Carlton Hall Club v. Lawrence* [1929] 2 K. B. 153, 164.

⁹⁸ (1857) 8 D. M. G. 731 ; 114 R. R. 306 ; per Knight Bruce L.J. 8 D. M. G. at 740 ; per Turner L.J. at 743 ; 114 R. R. 312, 314.

domiciled British subject or not. But this was not required by the decision and is not confirmed by any later authority.

In *Grell v. Levy*^{**} an agreement was made in France between an English attorney and a French subject that the attorney should recover a debt for the client in England and keep half of it. Our rules against champerty are not known to the French law;¹ but here the agreement was to be performed in England by an officer of an English court.² Perhaps, indeed, the English law governing the relations and mutual rights of solicitor and client may be regarded as a law of English procedure; and in that character, of course, private arrangements cannot acquire any greater power to vary it by being made abroad.³

As for agreements contrary to the public interests of the state in whose courts they are sued upon, it is obvious that the courts must refuse to enforce them without considering any foreign law. The like rule applied to the class of agreements in aid of hostilities against a friendly state of which we have already spoken. In practice, however, an agreement of this kind is more likely than not to be unlawful everywhere. Thus an agreement made in New York to raise a loan for insurgents in China would not be lawful in England; but it would also not be lawful in New York, and for the same reason. It might possibly happen, on the other hand, that the United States should recognize such insurgents while they were not recognized by England; and in that case the courts of New York would regard the contract as lawful, but ours would not.

It should be borne in mind that the foregoing discussion has nothing to do with the *formal* validity of contracts, which is governed by other rules (expressed in a general way by the maxim *locus regit actum*); and also that all rules as to the conflict of laws depend on practical assumptions as to the conduct to be expected at the hands of civilized legislatures and tribunals. It is in theory perfectly competent to the sovereign power in any particular state to impose any restrictions, however capricious and absurd, on the action of its own municipal courts; and even to municipal courts, in the absence of any paramount directions, to pay as much or as little regard as they please to any foreign opinion or authority.

9. *Supervening illegality*—An agreement is in general invalid here if and so far as the performance of it is or becomes unlawful by the law of the country where it is to be performed. This is now the general rule;⁴ there is not any different rule where the place of performance is out of the jurisdiction, though it would. of

^{**} (1864) 16 C. B. N. S. 73 ; 139 R. R. 414.

¹ But as to officers of the courts, see Cod. Civ. 1597.

² Per Erle C.J. at 79.

³ See judgment of Williams J.

⁴ Dicey, *Conflict of Laws*, 5th ed. 657, approved in *Ralli v. Csa. Naviera* [1920] 2 K. B. 287 ; 89 L. J. K. B. 999, C. A. The statement formerly current that illegality under a foreign law is equivalent here to impossibility in fact cannot now be accepted.

course, have to be proved as a fact that performance was or became unlawful according to the law of the local jurisdiction.

It used to be said, as we have seen (pp. 296-297), that our courts do not regard the revenue laws of foreign states; under that doctrine an agreement aiming at the evasion of foreign revenue duties might be good and enforceable here; but it seems very doubtful whether any such exception would now be admitted.

It is almost superfluous to add that the rule applies to negative as well as affirmative promises. "It would be absurd to suppose that an action should lie against parties for doing that which the legislature has said they shall be obliged to do."⁵

10. Otherwise the validity of a contract is generally determined by the law as it existed at the date of the contract.

This is a wider rule than those we have already stated, as it applies to the form as well as to the substance of the contract, and not only to the question of legality but to the incidents of the contract generally.⁶ It is needless to seek authority to show that an originally lawful contract cannot become in itself unlawful by a subsequent change in the law. [The contract, however, is discharged by frustration if that is the correct interpretation of the change in the law.⁷] It does not seem certain, however, that the converse proposition would always hold good. Perhaps the parties might be entitled to the benefit of a subsequent change in the law if their actual intention in making the contract was not unlawful. [The question has been more fully considered in American law.⁸]

The question may be put as follows on an imaginary case, which the facts of *Waugh v. Morris*⁹ show to be quite within the bounds of possibility. A. and B. make an agreement which by reason of a state of things not known to them at the time is not lawful. That state of things ceases to exist before it comes to the knowledge of the parties, and before the agreement is performed, but A. refuses to perform the agreement on the ground that it was unlawful when made. Is this agreement a contract on which B. can sue A.? Justice and reason seem to call for an affirmative answer, and the analogy of *Waugh v. Morris*,⁹ where the Court looked to the actual knowledge and intention of the parties at the time of

⁵ *Wynn v. Shropshire Union Rys. and Canal Co.* (1850) 5 Ex. 420, 440.

⁶ Sav. Syst. § 392 (8 435).

⁷ [P. 243. See, too, *Newington Local Board v. Cottingham Local Board* (1879) 12 Ch. D. 725; 48 L. J. Ch. 226; *Metropolitan Water Board v. Dick* [1918] A. C. 119; 87 L. J. K. B. 370.]

⁸ [Williston, Contracts, may be thus summarized. If the original bargain has been executed by one of the parties, his act is not invalidated by the fact that the bargain was illegal. But where the originally illegal bargain remains executory, subsequent validating legislation will not ordinarily make it lawful; *secus* with statutes passed expressly to validate such bargains. If the bargain is absolutely void at its inception either because it is made so by law or because it lacks the requisites of a contract, a later curative statute or the repeal of a prohibitory law will not validate it. "The legislature cannot make a contract when the parties themselves have made none"; § 175B. See, too, *Restatement of Contracts*, § 608 (b).]

⁹ (1873) L. R. 8 Q. B. 202; 42 L. J. Q. B. 57; p. 340.

the contract, is also in its favour. Apart from this, a contract which provides for something known to the parties to be not lawful at the time being done in the event, and only in the event, of its being made lawful, is free from objection and valid as a conditional contract:¹⁰ unless, indeed, 'the thing were of such a kind that its becoming lawful could not be properly or seriously contemplated.'¹¹

RESULTS AS TO KNOWLEDGE OF PARTIES

It may be useful to collect here in a separate form the results of the foregoing discussion, so far as they show in what circumstances and to what extent the knowledge of the parties is material on the question of illegality.

(i) If the immediate object of agreement be unlawful, the knowledge of either or both parties is immaterial:¹² except, perhaps, where the agreement is made in good faith and in ignorance of a state of things making it unlawful: and in this case it is submitted for the reasons above given that the agreement becomes valid if that state of things ceases to exist in time for the agreement to be lawfully performed according to the original intention.

(ii) A. makes an agreement with B. the execution of which would involve an unlawful act on B.'s part (e.g., a breach of B.'s contract with C.).

If A. does not know this, there is generally a good contract, and A. can sue B. for a breach of it, though B. cannot be compelled to perform it or may be restrained¹³ from performing it. We may say (and must, it seems, where the illegality is such as to involve a personal incapacity on B.'s part to make such a contract) that B. is deemed to warrant that he can lawfully perform his promise.

The contract is voidable at A.'s option *on the ground of fraud*, if B. has falsely stated or actively concealed the facts; but not otherwise.¹⁴

If A. does know the facts, the agreement is void.¹⁵

¹⁰ *Taylor v. Chichester and Midhurst Ry. Co.* (1867) L. R. 4 H. L. 628, 640, 645; 39 L. J. Ex. 217; cp. *Mayor of Norwich v. Norfolk Ry. Co.* (1855) 4 E. & B. 397; 24 L. J. Q. B. 105; 99 R. R. 518; p. 256.

¹¹ Cp. D. 18. 1. de cont. empt. 34 § 2 (Paulus). *Liberum hominem scientes emere non possumus; sed nec talis emptio aut stipulatio admittenda est: cum servus erit, quamvis dixerimus futuras res emi posse; nec enim fas est eiusmodi casus expectare.*

¹² A strong illustration of this will be found in *Wilkinson v. Loundsack* (1814) 3 M. & S. 117; 15 R. R. 438. In *South African Breweries v. King* [1899] 2 Ch. 173; 68 L. J. Ch. 530, in C. A. [1900] 1 Ch. 273; 69 L. J. Ch. 171, the parties were advised that a clause of their agreement was, or might be held, invalid by the local law, but executed the agreement containing that clause for what it might be worth. Nothing decided in the case turned upon this rather curious state of facts.

¹³ *Jones v. North* (1875) L. R. 19 Eq. 426; 44 L. J. Ch. 388.

¹⁴ *Beachey v. Brown* (1860) E. B. & E. 796; 29 L. J. Q. B. 105; 113 R. R. 892; but one can never be quite safe in drawing any general conclusion from a decision on the contract to marry. And cp. D. 18. 1. de cont. empt. 34 § 3.

¹⁵ [Cf. Prof. Lauterpacht in L. Q. R. lii, 494—529 (1936): "Contracts to break a contract."

An agreement conditional on M.'s consent to something for which that consent is required is of course good enough. Likewise A. may well promise Z. that he will do such a thing and for that purpose will procure M.'s consent. Whether a condition or undertaking of this kind can ever, in special circumstances, be implied may be a question of some nicety.

(iii) A. makes an agreement with B. who intends by means of the agreement or of something to be obtained or done under it to effect an unlawful or immoral purpose.

If A. does not know of this purpose, there is a contract voidable at his option when he discovers it.

If he does know of it, the agreement is void.

9

MISTAKE

PART I—OF MISTAKE IN GENERAL

So far we have been dealing for the most part with general conditions for the formation or subsistence of a valid contract, and accordingly the rules of law we have had occasion to explain are for the most part collateral or even paramount to the actual intention or belief of the parties. Apparent exceptions occur, but are mostly reducible to rules of construction. We now come to deal with cases in which the consent of the parties is the central point of the inquiry; the question being how the legal validity of an agreement is affected when the consent or apparent consent is determined by certain causes.

The existence of consent is ascertained in the first instance by the rules and principles set forth in the first chapter. When the requirements there stated are satisfied by a proposal duly accepted, there is on the face of the matter a good agreement, and the mutual communications of the parties are taken as the expression of a valid consent. But we still require other conditions in order to make the consent binding on him who gives it, although their absence is in general not to be assumed, and the party seeking to enforce a contract is not expected to give affirmative proof that they have been satisfied. Not only must there be consent, but the consent must be true, full, and free.

The reality and completeness of consent may be affected by ignorance, that is, either by wrong belief (which may consist in or include oblivion of material facts) or by mere absence of information or belief as to some fact material to the agreement. Freedom of consent may be affected by fear or by the consenting party being, though not in bodily or immediate fear, yet so much under the other's power, or in dependence on him, as not to be in a position to exercise his own deliberate choice. Now the results are different according as these states of mind are or are not due to the conduct of the other party (or, in certain cases, to a relation between the parties independent of the particular occasion). When they are so, the legal aspect of the case is altogether changed, and we look to that other party's conduct or position rather than to the state of mind induced by it. We speak not of Mistake induced by Fraud, but of Fraud simply, as a ground for avoiding contracts,

though there can be no Fraud where there is no Mistake. We have then the following combinations:

A. *Ignorance.*

- | | |
|---|--|
| A. Not caused by act ¹ of other party, is referred in law to the head of | <i>Mistake.</i> |
| Caused by act ¹ of other party | |
| B. without wrongful intention. | <i>Misrepresentation.</i> |
| C. with wrongful intention. | <i>Fraud</i> [or, in some cases, <i>Mistake</i> ^{1,2}] |

B. *Fear, or dependence excluding freedom of action.*

- | | |
|--|----------------------------|
| Not caused by act ² of other party or relation between the parties. | (Immaterial.) |
| D. Caused by such acts. | <i>Duress or Coercion.</i> |
| E. By such relation. | <i>Undue influence.</i> |

The term "mutual mistake" has long been in common use to signify the fact of both parties holding and acting on the same erroneous belief. It is more correct to say "common," but the usage is older than the similar one of "mutual friend," and seems to be inveterate. It is not so bad as Walter Scott's "mutual door" for a communication door between two rooms, quoted in the Oxford Dictionary. There would be a real mutual mistake if A. and B., in fact unknown to one another, met by chance, A. greeted B. taking him for M., and B. returned the greeting taking A. for N.

The legal consequences of these states of things are exceedingly various.

A. Mistake does not *of itself* affect the validity of contracts at all.¹ But mistake may be such as to prevent any real agreement from being formed; in which case the agreement is void; or mistake may occur in the expression of a real agreement; in which case, subject to rules of evidence, the mistake can be rectified. There are also rules in the construction of certain species of contracts which are founded on the assumption that the expressions used do not correspond to the real intention.² Note that Mistake is not a term of art and no general positive rule of law can be framed about it. Attempts at a technical definition are useless.³

B. Contracts induced by material misrepresentation of fact, even if the representation was made with belief in its truth, are voidable at the option of the party misled.

In several kinds of contracts a party in possession of material facts is under a positive duty to disclose them, and failure so to do has the same effect as active misrepresentation.⁴

¹ It will be seen hereafter that omissions are equivalent to acts for this purpose in certain special cases.

² [E.g., *Foster v. Mackinnon* (1869) L. R. 4 C. P. 704; *post*, 374.]

³ Just as fear, merely as a state of mind in the party, is in itself immaterial. As fear is to Coercion, so is Mistake to Fraud: Sav. Syst. 3. 116.

⁴ Pp. 202—203.

⁵ The notion that the word Mistake has some kind of magic virtue, put about for many years by text-writers on equity jurisprudence and even by some judges, is answerable for much confused thinking and for sundry doubts not yet cleared up.

⁶ It will be seen, when we come to the details, that these specially stringent rules are in fact much older than the declaration of a general one.

c. Contracts induced by fraud are not void, but voidable at the option of the party deceived.^a

d, e. Contracts entered into under coercion or undue influence are not void, but voidable at the option of the party on whom coercion or undue influence is exercised.

It is now seldom, if ever, necessary or useful to consider the former differences between the doctrines of the common law and those of equity.

These topics have now to be considered in order. And first of Mistake.

The whole topic was formerly surrounded with a great deal of confusion in our books, though on the whole of a verbal kind, and more embarrassing to students than to practitioners. Exactly the same kind of confusion prevailed in the civil law (whence indeed some of it passed on to our own) until Savigny cleared it up in the masterly essay which forms the Appendix to the third volume of his *System*. The principles there established by him have been fully adopted by later writers,^b and appear to be in the main applicable to the law of England.

The difficulties which have arisen as well as with us as in the civil law may be accounted for under the following heads :

(1) Confusion of proximate with remote causes of legal consequences ; in other words, of cases where mistake has legal results of its own with cases where it determines the presence of some other condition from which legal results follow, or the absence of some other condition from which legal results would follow, or even where it is absolutely irrelevant.

(2) The assertion of propositions as general rules which ought to be taken with reference only to particular effects of mistake in particular classes of cases. Such are the maxim *Non videntur qui errant consentire* and other similar expressions, and to some extent the distinction between ignorance of fact and of law.^c

(3) Omission to assign an exact meaning to the term "ignorance of law" in those cases where the distinction between ignorance of law and ignorance of fact is material (the true rule, affirmed for the Roman law by Savigny, and in a slightly different form for English law by Lord Westbury^d being that "ignorance of law" means only ignorance of a *general rule* of law, not ignorance of a right depending on questions of mixed law and fact, or on the true construction of a particular instrument).

It is needless to point out in detail how these influences have operated on our books and even on judicial expressions of the law. We rather proceed to deal with the matter affirmatively on that which appears to us its true footing.

^a [Fraud may, in some circumstances, induce a mistake of fact which avoids the contract ; *Cundy v. Lindsay* (1878) 3 App. Cas. 459 ; *post*, 380.]

^b Some of his conjectural dealings with specific anomalies in the Roman texts are at least daring, but this does not concern English students. For the old difficulties, cp. Grotius *De Iure B. ac P.* i. ii. c. 11, 6. "De pacto errantis perplexa satis tractatio est."

^c See Savigny's Appendix, Nos. VII., VIII. Syst. 3, 342, 344.

^d *Cooper v. Phibbs* (1867) L. R. 2 H. L. at 170 : to which the *dicta* in the later case of *Earl Beauchamp v. Winn* (1873) L. R. 6 H. L. 223, really add little or nothing. [The meaning of mistake of law is investigated by the editor of this book in 59 L. Q. R. (1943), 327—342.]

1.—MISTAKE IN GENERAL^{*}

The general rule of private law is that mistake *as such* has no legal effects at all. This may be more definitely expressed as follows:

When an act is done under a mistake, the mistake does not either add anything to or take away anything from the legal consequences of that act either as regards any right of other persons or any liability of the person doing it, nor does it produce any special consequences of its own;

Unless knowledge of something which the mistake prevents from being known, or an intention necessarily depending on such knowledge, be from the nature of the particular act a condition precedent to the arising of some right or duty under it.

Special exceptions to the rule exist, but even these are founded on special reasons beside, though connected with, the mistake itself.

Before proceeding to exemplify the truth of this proposition we will cite the nearest approach to a comprehensive statement of principle yet made by high judicial authority. "It is true that in general the test of intention in the formation of contracts and the transfer of property is objective; that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic. Whether the mistake does satisfy this description may often be a matter of great difficulty."¹⁰

First, mistake is in general inoperative as to the legal position or liability of the party doing an act. We must premise that a large class of cases is altogether outside this question, as appears by the qualification with which the rule has just been stated; those, namely, where a liability attaches not to the doing of an act in itself, but to the doing of it *knowingly*. There, if the act is done without knowledge, the offence or wrong is not committed, and no liability arises. It is not that ignorance is an excuse for the wrongful act, but that there is no wrongful act at all.¹¹

It is certain that ignorance is as a rule no excuse as regards either the liabilities of a quasi-criminal kind which arise under

^{*} [See Dr. Cheshire in 60 L. Q. R. (1944), 175—189. For American law, see Williston, §§1535—1600 F; and Restatement of Contracts, Ch. 17.]

¹⁰ *Norwich Union Fire Insce. Soc. v. Wm. H. Price, Ltd.* [1934] A. C. 455, 463; 103 L. J. P. C. 115, judgment of Jud. Comm. delivered by Lord Wright.

¹¹ The wider question how far and under what conditions ignorance of fact excludes criminal liability is beyond the scope of this work, and too important to be discussed incidentally. See thereon Stephen's Digest of Criminal Law, Art. 45; *Reg. v. Prince* (1875) L. R. 2 C. R. 154; 44 L. J. M. C. 122; and consult O. W. Holmes, *The Common Law*, pp. 49 sqq.

penal statutes¹² or such as are purely civil. Thus ignorance of the true ownership of property is no defence to an action for its recovery, except for carriers and a few other classes of persons exercising public employments of a like nature, who by the necessity of the case are specially privileged.¹³ Again, railway companies and other employers have in many cases been held liable for acts of their servants done as in the exercise of their regular employment, and without any unlawful intention, but in truth unlawful by reason of a mistake on the part of the servant: the act being one which, if the state of circumstances supposed by him did exist, would be within the scope of his lawful authority.¹⁴ Of course the servant himself is equally liable. Here, indeed, it looks at first sight as if the mistake gave rise to the employer's liability. For the act, if done with knowledge of the facts, and so merely wrongful in intention as well as in effect, would no more charge the employer than if done by a stranger. But it is not that mistake has any special effect, but that knowledge, where it exists, takes the thing done out of the class of authorized acts. The servant who commits a wilful and gratuitous wrong, or goes out of his way to do something which if the facts were as he thought might be lawful or even laudable, but which he has no charge to do, is no longer about his master's business.

Real exceptions are the following:—An officer of a court who has quasi-judicial duties to perform, such as those of a trustee in bankruptcy, is not personally answerable for money paid by him under an excusable misapprehension of the law.¹⁵ Also an officer who in a merely ministerial capacity executes a process apparently regular, and in some cases a person who pays money under compulsion of such process, not knowing the want of jurisdiction, is protected, as it is but reasonable that he should be.¹⁶ But this special exception is confined within narrow bounds. Mistake as to extraneous facts, such as the legal character of persons or the ownership of goods is no excuse. It is "a well-established rule of law that if by process the sheriff is desired to seize the goods of A., and he takes those of B., he is liable to be sued in trover for them."¹⁷ A sheriff seized under a *fi. fa.* goods supposed to belong to the debtor by marital right. Afterwards the supposed wife discovered that when she went through the ceremony of marriage the man had another wife living: consequently she was still the sole owner of the goods when they were seized. Thereupon she

¹² That ignorance cannot be pleaded in discharge of statutory penalties, see *Carter v. McLaren* (1871) L. R. 2 Sc. & D. 125-6.

¹³ *Fowler v. Hollins* (1872) Ex. Ch. L. R. 7 Q. B. 616; *affd.* in H. L. *nom. Hollins v. Fowler* (1874-5) L. R. 7 H. L. 757.

¹⁴ See Pollock on Torts, 14th ed. 72-75.

¹⁵ *Ex parte Ogle* (1873) L. R. 8 Ch. 711; 42 L. J. Bk. 99.

¹⁶ See *Mayor of London v. Cox* (1866) L. R. 2 H. L. at 269; 36 L. J. Ex. 225.

¹⁷ Lord Tenterden C.J. *Glasspoole v. Young* (1829) 9 B. & C. 696, 700; 33 R. R. 294, 297; *cp. Garland v. Carlisle* (1837) 4 Cl. & F. 693.

brought trover against the sheriff, and he was held liable, though possibly the plaintiff might have been estopped if she had asserted at the time that she was the wife of the person against whom the writ issued.¹⁸ The powers of a Superior Court, under express rules or otherwise, to correct slips in its own proceedings, is on a different footing: but it is not exercised indiscriminately.¹⁹

There are certain classes of cases in which it may be said that mistake, or at any rate ignorance, is the condition of acquiring legal or equitable rights. These are the exceptional cases in which an apparent owner having a defective title, or even no title, can give to a purchaser a better right than he has himself, and which fall partly under the rules of law touching market overt and the transfer of negotiable instruments, partly under the rule of equity that the purchase for valuable consideration without notice of any legal estate, right, or advantage is 'an absolute, unqualified, unanswerable defence' ²⁰ against any claim to restrict the exercise or enjoyment of the legal rights so acquired.²¹ These rules depend on special reasons. The two former introduce a positive exception to the ordinary principles of legal ownership, for the protection of purchasers and the convenience of trade. It is natural and necessary that such anomalous privileges should be conferred only on purchasers in good faith. Now good faith on the purchaser's part presupposes ignorance of the facts which negative the vendor's apparent title. It may be doubted on principle, indeed, whether this ignorance should not be free from negligence (in other words, accompanied with "good faith" in the sense of the Indian Codes), in order to entitle him. For some time this was so held in the case of negotiable instruments, but is so no longer.²² The rule of equity though in some sort analogous to this, is not precisely so. A. transfers legal ownership to B., a purchaser for value, by an act effectual for that purpose. If in A.'s hands the legal ownership is fettered by an equitable obligation restraining him wholly or partially from the beneficial enjoyment of it, this alone will not impose any restriction upon B. For all equitable rights and duties are, in their origin and proper nature, not *in rem* but *in personam*: they confer obligations not dominia. But if B. (by himself or his agent)

¹⁸ *Glasspoole v. Young* (1829) 9 B. & C. 696, 701; 33 R. R. 294, 298.

¹⁹ *Ainsworth v. Wilding* [1896] 1 Ch. 673; 65 L. J. Ch. 432; and see *Re Coles and Ravenshear* [1907] 1 K. B. 1; 76 L. J. K. B. 27, C. A., as to relieving a party against his own adviser's mistake in matter of procedure. Again the effect of a ministerial blunder in executing the Court's orders may be to nullify the whole proceeding, as being a merely unauthorised act, and leave the Court free: *Re Joseph Clayton, Ltd.* [1920] 1 Ch. 257; 89 L. J. Ch. 188.

²⁰ *Pilcher v. Rawlins* (1872) 1 L. R. 7 Ch. 259, 269; 41 L. J. Ch. 485, per James L. J.; *Blackwood v. London Chartered Bank of Australia* (1874) L. R. 5 P. C. 92, 111; 43 L. J. P. C. 25.

²¹ This applies not only to purely equitable claims but to all purely equitable remedies incident to legal rights. But it does not apply to those remedies for the enforcement of legal rights which in a few cases have been administered by courts of equity concurrently with courts of law: Per Lord Westbury, *Phillips v. Phillips* (1861) 4 D. F. 208; 31 L. J. Ch. 321; 135 R. R. 97.

²² See Chap. 5, p. 178.

knows of the equitable liability, or if the circumstances are such that with reasonable diligence he would know it, then he makes himself, actively by knowledge, or passively by negligent ignorance, a party to A.'s breach of duty.²³ In such case he cannot rely on the legal right derived from A., and disclaim the equitable liability which he knew or ought to have known to attach to it: and the equitable claim is no less enforceable against him than it formerly was against A. To be accurate, therefore, we should say not that an exception against equitable claims is introduced in favour of innocent purchasers, but that the scope of equitable claims is extended against purchasers who are not innocent; not that ignorance is a condition of acquiring rights, but that knowledge (or means of knowledge treated as equivalent to actual knowledge) is a condition of being laden with duties which, as the language of equity has it, affect the conscience of the party.²⁴

Even here the force and generality of the main rule is shown by the limits set to the exceptions. The purchaser of any legal right for value and without notice is to that extent absolutely protected. But the purchaser of an equitable interest, or of a supposed legal right which turns out to be only equitable, must yield to all prior equitable rights,²⁵ however blameless or even unavoidable his mistake may have been. Again, no amount of negligence will vitiate the title of a *bona fide* holder of a negotiable instrument, but not the most innocent mistake will enable him to make title through a forged indorsement. Where a bill was drawn payable to the order of one H. Davis and indorsed by another H. Davis, it was held that a person who innocently discounted it on the faith of this indorsement had no title.²⁶ It might also be said that where tacit assent or acquiescence is in question, there ignorance is in like manner a condition of not losing one's rights. But this is not properly so. For it is not that ignorance avoids the effect of acquiescence, but that there can be no acquiescence without knowledge. It is like the case where knowledge or intention must be present to constitute an offence. In this case and for this purpose "*nulla voluntas errantis est.*"²⁷

The same principles hold in cases more directly connected with

²³ Thus one who acquires property known to be part of a trust estate from a vendor known to be a trustee, and conveying otherwise than under the authority of the Court itself, takes it subject to all trusts and equities : *Perham v. Kempster* [1907] 1 Ch. 373, 380 ; 76 L. J. Ch. 223.

²⁴ Observe that on the point of negligence the rule of equity differs from the rules of law : though, as the subject-matter of the rules is different, there is no actual conflict.

²⁵ *Phillips v. Phillips* (1861) 4 D. F. J. 208 ; 31 L. J. Ch. 321. A court of equity would not deprive a purchaser for value without notice of anything he had actually got, e.g., possession of title deeds : *Heath v. Crealock* (1874) L. R. 10 Ch. 22 ; 44 L. J. Ch. 157 ; *Waldy v. Gray* (1875) L. R. 20 Eq. 238 ; 44 L. J. Ch. 394 ; but now that the Court can administer both legal and equitable remedies in every case this rule has lost its practical importance : *Re Cooper* (1882) 20 Ch. Div. 611, 632 ; 51 L. J. Ch. 862. Similarly as to discovery : *Ind, Coope & Co. v. Emmerson* (1887) 12 App. Ca. 300.

²⁶ *Mead v. Young* (1790) 4 T. R. 28 ; 2 R. R. 314.

²⁷ D. 39. 3. de aqua pluvi. 20.

the subject of this work. A railway company carries an infant above the age of three years without taking any fare, the clerk assuming him to be under that age, and there being no fraud on the part of the person in whose care he travels; the mistake does not exclude the usual duty on the company's part to carry him safely.²⁸ A person who does not correctly know the nature of his interest in a fund disposes of it to a purchaser for value who has no greater knowledge and deals with him in good faith; if he afterwards discovers that his interest was in truth greater and more valuable than he supposed it to be, he cannot claim to have the transaction set aside on the ground of this mistake.²⁹ This, however, is to be taken with caution, for it applies only to cases where the real intention is to deal with the party's interest, whatever it may be. The result would be quite different if the intention of both parties were to deal with it only on the express or implied condition that the state of things is not otherwise than it is supposed to be (pp. 239-241 and 372-374).

So far, then, mistake as such does not improve the position of the party doing a mistaken act. Neither does it as a rule make it any worse. A mistaken demand which produces no result does not affect a plaintiff's right to make the proper demand afterwards. Where B. holds money as A.'s agent to pay it to C., and appropriates it to his own use, C. may recover from A. notwithstanding a previous mistaken demand on B.'s estate, made on the assumption that B. would be treated as C.'s own agent.³⁰ Nor does a mistaken repudiation of ownership prevent the true owner of goods from recovering damages afterwards for injury done to them by the negligence of a bailee, whose duty it was to hold them for the true owner at all events.³¹ This is independent of and quite consistent with the rule that a party who has wholly mistaken his remedy cannot be allowed to proceed by way of amendment *in the same action* in an entirely different form and on questions of a different character.³²

Next, mistake does not in general alter existing rights. The presence of mistake will not make an act effectual which is otherwise ineffectual. Many cases which at first sight look like cases

²⁸ *Austin v. G. W. R. Co.* (1869) L. R. 2 Q. B. 442; 36 L. J. Q. B. 201. The mother of the infant plaintiff took only one ticket for herself; it seems that the contract operated in favour of both (*Lush J. L. R. 2 Q. B. at 447*). But the case is really one of those on the border-line of contract and tort, where the breach is not so much of a contractual duty as of a general duty annexed by law to a particular business or undertaking, such as was the ground of the action of *assumpsit* in its original form. See judgment of Blackburn J. and cp. the remarks of Grove J. in *Foulkes v. Metropolitan District Ry. Co.* (1880) 4 C. P. D. at 279; 49 L. J. C. P. 361, and the author's "Law of Torts," 14th ed. 432 sqq.

²⁹ *Marshall v. Collett* (1835) 1 Y. & C. Ex. 232; 41 R. R. 254.

³⁰ *Hardy v. Metropolitan Land and Finance Co.* (1872) L. R. 7 Ch. 427, 439; 41 L. J. Ch. 257.

³¹ *Mitchell v. Lancashire and Yorkshire Ry. Co.* (1875) L. R. 10 Q. B. 256, 261; 44 L. J. Q. B. 107.

³² *Jacobs v. Seward* (1872) L. R. 5 H. L. 464; 41 L. J. C. P. 221.

of relief against mistake belong in truth to this class, the act being such that for reasons independent of the mistake it is inoperative. Thus a trustee's payment over of rents and profits to a wrong person, whether made wilfully and fraudulently, or ignorantly and in good faith, cannot alter the character of the trustee's possession.³³ Where the carrier of goods after receiving notice from an unpaid vendor to stop them nevertheless delivers them by mistake to the buyer, this does not defeat the vendor's rights: for the right of possession³⁴ reverts in the vendor from the date of notice, if given at such a time and under such circumstances that the delivery can and ought to be prevented,³⁵ and the subsequent mistaken delivery has not, as an intentional wrongful delivery would not have, any power to alter it.³⁶ Again, by the rules of the French Post Office the sender of a letter can reclaim it after it is posted and before the despatch of the mail. C., a banker at Lyons, posted a letter containing bills of exchange on England endorsed to D., an English correspondent. These were in return for a bill on Milan sent by D. to C. Before the despatch of the mail, learning from D's agent at Lyons that the bill on Milan would not be accepted and D. desired that no remittance should be made, C. sent to the post-office to stop the letter. It was put aside from the rest of the mail, but by a mistake of C.'s clerk in not completing the proper forms it was despatched in the ordinary course. It was held that there was no effectual delivery of the bills to D., and that the property remained in C. The mistake of the clerk could not take "the effect of making the property in the bills pass contrary to the intention of both indorser and indorsee."³⁷ Had not the revocation been at the indorsee's request, then indeed the argument would probably have been correct that it was a mere uncompleted intention on C.'s part: for as between C. and the post office everything had not been done to put an end to the authority of the post-office to forward the letter in the regular course of post.³⁸

Again, the legal effect of a transaction cannot be altered by the subsequent conduct of the parties: and it makes no difference if that conduct is founded on a misapprehension of the original legal effect. A man who acts on a wrong construction of his own duties

³³ *Lister v. Pickford* (1865) 34 Beav. 576, 582; 34 L. J. Ch. 582; 145 R. R. 677.

³⁴ The book has *property*; but the word must here, as often, mean only right to possess. It is now well understood that stoppage *in transitu* does not rescind the contract: *Sale of Goods Act*, 1893, s. 48; *Kemp v. Falk*, 7 App. Ca. at 581.

³⁵ *Whitehead v. Anderson* (1842) 9 M. & W. 518; 11 L. J. Ex. 157; 60 R. R. 819. *Blackburn on Cont. of Sale*, 269, 2nd ed. by Graham, 384.

³⁶ *Litt v. Cowley* (1816) 7 Taunt. 169; 17 R. R. 482.

³⁷ *Ex parte Cole* (1873) L. R. 9 Ch. 27, 32; 43 L. J. Bk. 19.

³⁸ *Anderson's case* (1869) L. R. 8 Eq. 509, may possibly be supported on a similar ground. It was there held that a transfer of shares sanctioned by the directors and registered in ignorance that calls were due from the transferor might afterwards be cancelled, even by an officer of the company without authority from the directors, on the facts being discovered. It may be that the directors' assent to the transfer is not irrevocable (apart from the question of mistake) until the parties have acted upon it. *Sed qu.* At all events the dictum that "fraud or mistake, either of them, is enough to vitiate *any transaction*," does not recommend the decision.

under a contract he has entered into, does not thereby entitle himself, though the acts so done be for the benefit of the other party, to have the contract performed by the other according to the same construction.³⁹ This decision was put to some extent upon the ground that relief cannot be given against mistakes of law. But it is submitted that this is not a case where the distinction is really material. Suppose the party had not construed the contract wrongly, but acted on an erroneous recollection of its actual contents, the mistake would then have been one of fact, but it is obvious that the decision must have been the same. Still less can a party to a contract resist the performance of it merely on the ground that he misunderstood its legal effect at the time.⁴⁰ Every party to an instrument has a right to assume that the others intend it to operate according to the proper sense of its actual expressions.⁴¹

It must be remembered, however, that where both parties have acted on a particular construction of an ambiguous document, that construction, if in itself admissible, will be adopted by the Court.⁴² To this extent its original effect, though it cannot be *altered*, may be *explained* by the conduct of the parties. And moreover, if both parties to a contract act on a common mistake as to the construction of it, this may amount to a variation of the contract by mutual consent.⁴³ And a mistake of one party induced, though innocently, by the other has the same effect as a common mistake.⁴⁴ This is in truth another illustration of the leading principle. Here the conduct of the parties in performing the contract with variations would show an intention to vary it if the true construction were present to their minds. It might be said that they cannot mean to vary their contract if they do not know what it really is. But the answer is that their true meaning is to perform the contract at all events according to their present understanding of it, and thus the mistake is immaterial. It may well be

³⁹ *Midland G. W. Ry. of Ireland v. Johnson* (1858) 6 H. L. C. 798, 811; 108 R. R. 313, 319, per Lord Chelmsford. On the other hand, one who takes a wider view of his rights under a contract than the other party will admit is free to waive that dispute and enforce the contract to the extent which the other does admit: *Preston v. Luck* (1884) 27 Ch. Div. 497.

⁴⁰ *Powell v. Smith* (1872) L.R. 14 Eq. 85; 41 L.J. Ch. 734. The dictum in *Wycombe Ry. Co. v. Donnington Hospital* (1866) L. R. 1 Ch. 773, cannot be supported in any sense contrary to this.

⁴¹ Per Knight Bruce L.J. *Bentley v. Mackay* (1862) 4 D. F. J. 285. Cp. Ch. 6., pp. 201—202.

⁴² *Forbes v. Watt* (1872) L. R. 2 Sc. & D. 214. Evidence of the construction put on an instrument by some of the parties is of course inadmissible: *McClellan v. Kennard* (1874) L. R. 9 Ch. 336, 349; 43 L.J. Ch. 323. And a party who has acted on one of two possible constructions of an obscure agreement cannot afterwards enforce it according to the other: *Marshall v. Berridge* (1881) 19 Ch. Div. 233, 241; 51 L.J. Ch. 329.

⁴³ *Midland G. W. Ry. of Ireland v. Johnson* (1858) 6 H. L. C. 812-3. In the particular case the appellants were an incorporated company, and therefore it was said could not be thus bound: *sed qu.*

⁴⁴ *Wilding v. Sanderson* [1897] 2 Ch. 534; 66 L.J. Ch. 684, C. A.; *Stewart v. Kennedy* (No. 2) (1890) 15 App. Ca. 75, 10 B.

that the parties are acting on a real original intention incorrectly expressed in the contract.

Again, mistake, in the sense of omission by pure forgetfulness to do something that ought to have been done, is not a ground for a court of equity in its discretion (assuming that it has jurisdiction) to relieve against forfeiture.⁴⁵

The special classes of cases in which mistake can properly be said to be of importance are believed to be as follows:

1. Where mistake is such as to exclude real consent, and so prevent the formation of any contract, there the seeming agreement is void. Of this we shall presently speak at large (Part 2 of this chapter).

2. Where a mistake occurs in expressing the terms of a real consent, the mistake may be remedied by the equitable jurisdiction of the Court. Of this also we shall speak separately (Part 3).

3. A renunciation of rights in general terms is understood not to include rights of whose actual or possible existence the party was not aware. This is in truth a particular case under No. 2.

All these exceptions may be considered as more apparent than real.

4. Money paid under a mistake of fact may be recovered back.

This is a real exception, and the most important of all. Yet even here the legal foundation of the right is not so much the mistake in itself as the failure of the supposed condition on which the money was paid; and the question is not of avoiding an existing obligation but of creating a new one.

2.—MISTAKE OF FACT AND OF LAW⁴⁶

Mere ignorance of law will not generally furnish any excuse or defence.⁴⁷ As has often been said, the administration of justice would otherwise be impossible. Practically the large judicial discretion which can be exercised in criminal law may be trusted to prevent the rule from operating too harshly in particular cases. On the other hand it would lead to hardship and injustice not remediable by any judicial discretion if parties were always to be bound in matters of private law by acts done in ignorance of their

⁴⁵ *Barrow v. Isaacs* [1891] 1 Q. B. 417; 60 L. J. Q. B. 179, C. A.

⁴⁶ [I have examined the topic in 59 L. Q. R. (1943), 327—342. P. H. W. For American law, see Williston, *Contracts*, §§1581—1592. Practice is by no means uniform in the various States as to the distinction between mistake of fact and mistake of law. Eight States have refused to draw the distinction and allow relief for either kind of mistake. Two others have gone to the opposite extreme of denying the exception (generally admitted in most of the States) that a mistake purely of law justifies no relief: *ib.* §1582.]

⁴⁷ For a modern illustration, see *Utermehle v. Norment* (1904) 197 U. S. 40, 55, 56. As to the current but inaccurate form of statement, see per Maule J. *Martindale v. Falkner* (1846) 2 C. B. at 719; 69 R. R. at 611: "There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so. . . . The rule is that ignorance of the law shall not excuse a man, or relieve him from the consequences of a crime, or from liability upon a contract."

civil rights. There is an apparent conflict between these two principles which has given rise to much doubt and discussion.⁴⁸ [Another source of difficulty is that fact and law are, in certain respects, so closely implicated with each other as to be inextricable.]⁴⁹ But the conflict, if indeed it be not merely apparent, is much more limited in extent than has been supposed.

It is often said that relief is given against mistake of fact but not against mistake of law. But neither branch of the statement is true without a great deal of limitation and explanation. We have already seen that in most transactions mistake is altogether without effect. There such a distinction has no place. Again, there are the many cases where, as we have pointed out above, knowledge or notice is a condition precedent to some legal consequence. By the nature of these cases it generally if not always happens that the subject-matter of such knowledge, or of the ignorance which by excluding it excludes its legal consequences, is a matter of fact and not of law. The general presumption of knowledge of the law does so far apply, no doubt, that a person having notice of material facts cannot be heard to say that he did not know the legal effect of those facts. All these, however, are not cases of relief against mistake in any correct sense.

Then come the apparent exceptions to the general rule, which we have numbered 1, 2 and 3. As to No. (1) it is at least conceivable that a common mistake as to a question of law should go so completely to the root of the matter as to prevent any real agreement from being formed. It is laid down by very high authority "that a mistake or ignorance of the law forms no ground for relief from contracts fairly entered into with a full knowledge of the facts":⁵⁰ but this does not touch the prior question whether there is a contract at all. On cases of this class English decisions go to this extent at all events, that ignorance of particular private rights

⁴⁸ Savigny, followed by several later writers, would have it that mistake, to be a ground of relief, must be free from negligence, and ignorance of law is presumed, though not conclusively, to be negligent. But this will not fit English law as now settled on the most important topic, viz., recovering back money paid; for there, so long as the ignorance is of fact, negligence is no bar: means of knowledge are material only as evidence of actual knowledge: *Kelly v. Solari* (1841) 9 M. & W. 54; 11 L. J. Ex. 10; 60 R. R. 666; *Townsend v. Crowdy* (1860) 8 C. N. B. S. 477; 29 L. J. C. P. 300; 125 R. R. 740; *Imperial Bank of Canada v. Bank of Hamilton* [1903] A. C. 49; 72 L. J. P. C. 1; [*Anglo-Scottish, &c. Corporation v. Spalding U.D.C.* [1937] 2 K. B. 607; 106 L. J. K. B. 885]. The only limitation is that the party seeking to recover must not have waived all inquiry: per Parke B. in *Kelly v. Solari* (1841), 9 M. & W. 54, 59; and per Williams J. in *Townsend v. Crowdy* (1860) 8 C. B. N. S. 477, 494. See now for full discussion of Anglo-American authorities, Mr. M. M. Bigelow's notes to Story's Eq. Jurisp. 13th ed. ss. 111, 140; Keener on Quasi-Contracts, Ch. 2.

⁴⁹ [Jessel, M.R., in *Eaglesfield v. Londonderry* (1875) 4 Ch. D. 693, 703.]

⁵⁰ *Bank of U. S. v. Daniel* (1838) (Sup. Ct. U. S.) 12 Peters, 32, 56; but see *Daniel v. Sinclair* (J. C.) (1881) 6 App. Ca. 181, 190. The language of modern American authority persists in the old sharp distinction: *Upton v. Tribilcock* (1875) 91 U. S. 45, 50; but the allowance of exceptions is said to be increasing, see [note 48, and] Harv. Law Rev. xxxii, 284. Common mistake as to a collateral matter of law does not of course avoid a contract: *Eaglesfield v. Marquis of Londonderry* (1876) 4 Ch. D. 693.

is equivalent to ignorance of fact.⁵⁰ As to No. (2) the principle appears to be the same. A. and B. make an agreement and instruct C. to put it into legal form. C. does this so as not to express the real intention, either by misapprehension of the instructions or by ignorance of law. It is obvious that relief should be equally given in either case. In neither is there any reason for holding the parties to a contract they did not really make.

Authority seems to bear out what is here advanced.⁵¹ A common mistake of parties as to the effect of a particular instrument is sufficient ground for varying a consent order founded on the mistaken opinion,⁵² [or for setting aside altogether a compromise of litigation].^{52a} There is clear authority that on the other hand a court of equity will not reform an instrument by inserting in it a clause which the parties deliberately agreed to leave out,⁵³ nor substitute for the form of security the parties have chosen another form which they deliberately considered and rejected,⁵⁴ although their choice may have been determined by a mistake of law. The reason of these decisions is that in such cases the form of the instrument, by whatever considerations arrived at, is part of a real agreement. The parties have not been deprived by mistake or ignorance of the means of an effective choice of courses, but have made an effective choice which some or one of them afterwards dislikes.

As to No. (3), there is quite sufficient authority to show that a renunciation of rights under a mistake as to particular applications of law is not conclusive, and some authority to show that it is the same even if the mistake is of a general rule of law. [See No. (2) supra.] The deliberate renunciation or compromise of doubtful rights is of course binding; it would be absurd to set up ignorance of the law as an objection to the validity of a transaction entered into for the very reason that the law is not accurately known.⁵⁵ A compromise deliberately entered into under advice, the party's agents and advisers having the question fully before them, cannot be set aside on the ground that a particular point of law was mistaken or overlooked,⁵⁶ though it may be otherwise if the advice has been misapprehended, or was in fact given without regard to the parties' legal rights.⁵⁶ Conduct equivalent to renunciation of a disputed right is equally binding, at least when the party has the

⁵⁰ *Bingham v. Bingham* (1748) 1 Ves. Sr. 126; *Broughton v. Hutt* (1858) 3 De. G. & J. 501; 28 L. J. Ch. 167; 121 R. R. 207; *Cooper v. Phibbs* (1867) L. R. 2 H. L. 149, 170; of which cases a fuller account is given below.

⁵¹ *Hunt v. Rousmaniere's Adm.* (1828) (Sup. Ct. U. S.) 1 Peters, 1, 13, 14 (and a uniform course of later decisions in America; see Prof. Williston's note).

⁵² *Allcard v. Walker* [1896] 2 Ch. 369; 65 L. J. Ch. 660. [*Daniell v. Sinclair* (1881) 6 App. Cas. 181 (J. C.)].

^{52a} [*Hickman v. Berens* [1895] 2 Ch. 638; 64 L. J. Ch. 785].

⁵³ *Lord Ingham v. Child* (1781) 1 Bro. C.C. 92.

⁵⁴ Cp. the remarks on compromises in Ch. 4., pp. 151—153.

⁵⁵ *Stewart v. Stewart* (1839) 6 Cl. & F. 911; 49 R. R. 267; see the authorities reviewed, 6 Cl. & F. 966—970; 49 R. R. 276—279.

⁵⁶ *Re Roberts* [1905] 1 Ch. 704; 74 L. J. Ch. 483, C. A. (a peculiar case of Welsh-speaking parties).

question fairly before him. Thus in *Stone v. Godfrey*^{54a} the plaintiff had been advised on his title unfavourably indeed, but in such a way as to bring before him the nature of the question and give him a fair opportunity of considering whether he should raise it. Adopting, however, the opinion he had obtained, he acted upon it for a considerable time, and in a manner which amounted to representing to all persons interested that he had determined not to raise the question. It was held that although the mistake as to title might in the absence of such conduct well be a ground of relief, a subsequent discovery that the correctness of the former opinion was doubtful did not entitle him to set up his claim anew. In *Rogers v. Ingham*⁵⁷ a fund had been divided between two legatees under advice, and the payment agreed to at the time. One of the legatees afterwards sued the executor and the other legatee for payment, contending that the opinion they had acted upon was erroneous; it was held that the suit could not be maintained. Similarly where creditors accepted without question payments under a composition deed to which they had not assented, and which, as it was afterwards decided, was for a technical reason, not binding on non-assenting creditors, it was held that they could not afterwards treat the payments as made on account of the whole debt, and sue for the balance. They might have guarded themselves by accepting the payments conditionally, but not having done so they were bound.⁵⁶

[Note also that the Court leans strongly in favour of family arrangements, and is very reluctant to disturb them even where there has been a mistake of law.^{58a} The rule is a sensible one, for domestic quarrels about property are usually so bitter than any reasonable reconciliation by the parties themselves ought not to be lightly disturbed.]

As to No. (4), the subject of recovering back money paid by mistake does not properly fall within our scope.⁵⁹ It is here, how-

^{54a} (1854) 5 D. M. G. 76; 104 R. R. 32.

⁵⁷ (1876) 3 Ch. Div. 351; 46 L. J. Ch. 322. [The case also shews that a claimant for equitable relief is in no better position by trying to use it as a disguise for the Common Law action for money had and received.]

⁵⁶ *Kitchin v. Hawkins* (1866) L. R. 2 C. P. 22.

^{58a} [*Fane v. Fane* (1875) L. R. 20 Eq. 698; for earlier cases, see 59 L. Q. R. 331.]

⁵⁹ See an instructive statement of the principles as now understood in the judgment of Scrutton L.J. in *Holt v. Markham* [1923] 1 K. B. 504, 513; 92 L. J. K. B. 406, and the very full discussion in *H. E. Jones, Ltd. v. Waring and Gillow, Ltd.* [1926] A. C. 670; 95 L. J. K. B. 913, and further, as to complications arising from frauds of third parties, *British American Continental Bank v. British Bank for Foreign Trade* [1926] 1 K. B. 328; 95 L. J. K. B. 326, C. A. [As Pollock indicates that the topic falls outside the scope of this book, we can do no more than add here references to the later cases and literature in which the topic is considered. They are *Berg v. Sadler and Moore* [1937] 2 K. B. 158; 106 L. J. K. B. 593, C. A.; *Morgan v. Ashcroft* [1938] 1 K. B. 49; 106 L. J. K. B. 544, C. A.; *Re Cleadon Trust* [1939] Ch. 286; 108 L. J. Ch. 81; *Weld-Blundell v. Synott* [1940] 2 K. B. 107; 109 L. J. K. B. 282; Lord Wright, *Legal Essays* (1939), Ch. I, II; Dr. R. M. Jackson, *History of Quasi-Contract* (1936); Dr. C. K. Allen in 54 L. Q. R. (1931) 201—219; Prof. Sir William Holdsworth in 55 L. Q. R. (1939) 37—53; Mr. A. T. Denning, K.C., *ib.* 54—65; P. H. Winfield, *Province of the Law of Tort*, Ch. VII, and in 53 L. Q. R. (1937) 447—449, and 55 L. Q. R. (1939) 161—163; Dr. W. Friedmann in 53 L. Q. R. (1937) 449—453.]

ever, that the distinction between mistakes of fact and of law does undoubtedly prevail. While no amount of mere negligence avoids the right to recover back money paid under a mistake of fact,⁴⁰ money paid under a mistake of law cannot in any case be recovered.⁴¹ Nor does anything like the qualification laid down by Lord Westbury in *Cooper v. Phibbs*⁴² appear to be admitted. Ignorance of particular rights, however excusable, is on the same footing as ignorance of the general law.⁴³

An important decision of the American Supreme Court appears to assume that giving a negotiable instrument is for this purpose equivalent to the payment of money, so that a party who gives it under a mistake of law has no legal or equitable defence.⁴⁴ But, according to later English doctrine, inasmuch as "want of consideration is altogether independent of knowledge either of the facts or of the law," the defence of failure of consideration is available as between the parties to a negotiable instrument, whether the instrument has been obtained by a misrepresentation of fact or of law.⁴⁵

A covenant to pay a debt for which the covenantor wrongly supposes himself to be liable is valid in law, nor will equity give any relief against it if the party's ignorance of the facts negating his liability is due to his own negligence.⁴⁶

The Court of Bankruptcy will order repayment of money paid to a trustee in bankruptcy under a mistake of law: but this is no real exception, for it is not like an ordinary payment between party and party. The trustee is an officer of the Court and "is to hold money in his hands upon trust for its equitable distribution among the creditors."⁴⁷ In general the rule that a voluntary

⁴⁰ Note ⁴⁰, p. 368.

⁴¹ But as to re-opening accounts in equity, see *Daniell v. Sinclair* (J. C.) (1881) 6 App. Ca. 181.

⁴² (1867) L. R. 2 H. L. at 170.

⁴³ See *Skyring v. Greenwood* (1825) 4 B. & C. 281; 28 R. R. 264; [cf. *Weld-Blundell v. Symott* [1940] 2 K. B. 107; 109 L. J. K. B. 684]; and cp. *Platt v. Bromage* (1854) 24 L. J. Ex. 63; 101 R. R. 903, where however the mistake was not only a mistake of law, but collateral to the payment, the money being really due; *Aitken v. Short* (1856) 1 H. & N. 210; 25 L. J. Ex. 321; 108 R. R. 526, rests on the same ground, if the transaction in that case be regarded as the bare payment of another person's debt; if it be regarded as the purchase of a security, it is an application of the rule *casualt emptor*, as to which cp. *Clare v. Lamb* (1875) L. R. 10 C. P. 344; 44 L. J. C. P. 177. [Where there has been a mistake of fact, money paid under it is not recoverable unless the mistake is as to a fundamental fact. Such a mistake occurs where, had the fact been true, there would have been a legal liability to pay the money: *Morgan v. Ashcroft* [1938] 1 K. B. 49; 106 L. J. K. B. 544, C. A.; *Ayres v. Moore* [1940] 1 K. B. 278; 109 L. J. K. B. 91.]

⁴⁴ *Bank of U. S. v. Daniel* (1838) 12 Peters, 32; but this was not the only ground of the decision.

⁴⁵ *Southall v. Rigg, Forman v. Wright* (1851) 11 C. B. 481, 492; 20 L. J. C. P. 145; 87 R. R. 731; *Coward v. Hughes* (1855) 1 K. & J. 534; 103 R. R. 172.

⁴⁶ *Wason v. Waring* (1852) 15 Beav. 151; 92 R. R. 357. Whether relief could be given in any case, unless there were fraud on the other side, *quære*.

⁴⁷ *Ex parte James* (1874) L. R. 9 Ch. 609, 614, per James L. J. 43 L. J. Bk. 107. [Cf. *Re Wiggell* [1921] 2 K. B. 836; 90 L. J. K. B. 897; and 59 L. Q. R. 340—341.] This holds even after the money paid by mistake has been distributed, if the trustee still has or may have funds applicable for payment of dividends: *Ex parte Simmonds*

payment made with full knowledge of the facts cannot be recovered back is no less an equitable than a legal one: "the law on the subject was exactly the same in the old Court of Chancery as in the old Courts of Common Law. There were no more equities affecting the conscience of the person receiving the money in the one Court than in the other Court, for the action for money had and received proceeded upon equitable considerations."⁶⁸ Thus a party who has submitted to pay money under an award cannot afterwards impeach the award in equity on the ground of irregularities which were known to him when he so submitted.⁶⁹ It has also been laid down that in a common administration suit a legatee cannot be made to refund over-payments voluntarily made by an executor;⁷⁰ but the context shows that this was said with reference to the frame of the suit and the relief prayed for rather than to any general principle of law: moreover it was not the executor, but the persons beneficially interested who sought to make the legatee liable. But in *Bate v. Hooper*⁷¹ the point arose distinctly: certain trustees were liable to make good to their testator's estate the loss of principal incurred by their omission to convert a fund of Long Annuities: they contended that the tenant for life ought to recoup them the excess of income which she had received; but as she had not been a willing party to any over-payment,⁷² it was decided that she could not be called upon to refund the sums which the trustees voluntarily paid her.

PART II—MISTAKE AS EXCLUDING TRUE CONSENT^{72a}

In the first chapter we saw that no contract can be formed when there is a variance in terms between the proposal and the acceptance. In this case the question whether the parties really *meant* the same thing cannot arise, for they have not even *said* the same thing. A court of justice can ascertain a common intention of the parties only from some adequate expression of it, and the mutual communication of different intentions is no such expression.

We now have to deal with certain kinds of cases in which on the face of the transaction all the conditions of a concluded agree-

(1885) 16 Q. B. Div. 308; 55 L. J. Q. B. 74; and it seems to extend to all officers of the Court and all branches of the Supreme Court. [In *Re London County Commercial Reinsurance Office, Ltd.* [1922] 2 Ch. 67, 84; 91 L. J. Ch. 337; P. O. Lawrence, J., doubted whether the voluntary liquidator of a company is, for this purpose, an officer of the Court.]

⁶⁸ *Rogers v. Ingham* (1876) 3 Ch. Div. at 355, per James L. J. [The matter is considered in detail in 59 L. Q. R. 327—342; at p. 339, it is pointed out that, at Common Law, mistake as to private rights is reckoned as mistake of fact.]

⁶⁹ *Goodman v. Sayers* (1820) 2 Jac. & W. 249, 263; 22 R. R. 112.

⁷⁰ Per Lord Cottenham, *Lichfield v. Baker* (1840) 13 Beav. 447, 453; 88 R. R. 527, 531.

⁷¹ (1855) 5 D. M. G. 338; 104 R. R. 146.

⁷² She had in fact desired the trustees to convert the fund: see 5 D. M. G. 340; 104 R. R. 148; and compare *Currie v. Gould* (1817) 2 Madd. 163; 53 R. R. 33.

^{72a} [See Dr. Cheshire's article, "Mistake as affecting contractual assent," 60 L. Q. R. (1944), 175—194.]

ment are satisfied, and yet there is no real common intention and therefore no agreement.

First, it may happen that each party meant something, it may be a perfectly well understood and definite thing, but not the same thing which the other meant. Thus their minds never met, as is not uncommonly said, and the forms they have gone through are inoperative. This is quite consistent, as we shall see, with the normal and necessary rule (Ch. 6, pp. 193-194) that a promisor is bound by his promise in that meaning which his expression of it reasonably conveys.

Next, it may happen that there does exist a common intention, which, however, is founded on an assumption made by both parties as to some matter of fact essential to the agreement. In this case the common intention must stand or fall with the assumption on which it is founded. If that assumption is wrong, the intention of the parties is from the outset incapable of taking effect. But for their common error it would never have been formed, and it is treated as non-existent. Here there is in some sense an agreement: but it is nullified in its inception by the nullity of the thing agreed upon. The result is the same as if the parties had made an agreement expressly conditional on the existence at the time of the supposed state of facts: which state of facts not existing, the agreement destroys itself. Indeed there is in most if not all cases of this class no difficulty in holding that the contract did include a tacit condition to this effect.

In the former class of cases either one party or both may be in error: however, that which prevents any contract from being formed is not the existence of error but the want of true consent. "Two or more persons are said to consent when they agree upon the same thing in the same sense": this consent is essential to the creation of a contract,⁷³ and if it is wanting, and the facts be not otherwise such as to preclude one party from denying that he agreed in the sense of the other,⁷⁴ it matters not whether its absence is due to the error of one party only or of both.

In the latter class of cases the error must be common to both parties. They do agree to the same thing, and it would be in the same sense, but that the sense they intend, though possible as far as can be seen from the terms of the agreement, is in fact nugatory. As it is, their consent is idle; the sense in which they agree is, if one may so speak, insensible.

In both sets of cases we may say that the agreement is nullified by fundamental error; a term it may be convenient to use in order to mark the broad distinction in principle from those cases where mistake appears as a ground of special relief.

⁷³ Hannen J. in *Smith v. Hughes* (1871) L. R. 6 Q. B. 609; Indian Contract Act, 1872, s. 13.

⁷⁴ Hannen, J. *l.c.*, Blackburn J. at 607.

We proceed to examine the different kinds of fundamental error relating:

1. To the nature of the transaction.
2. To the person of the other party.
3. To the subject-matter of the agreement.⁷⁵

1.—ERROR AS TO THE NATURE OF THE TRANSACTION

On this the principal early authority is *Thoroughgood's case*.⁷⁶ In that case the plaintiff, who was a layman and unlettered, had a deed tendered to him which he was told was a release for arrears of rent only. The deed was not read to him. To this he said, "If it be no otherwise I am content"; and so delivered the deed. It was in fact a general release of all claims. Under these circumstances it was adjudged that the instrument so executed was not the plaintiff's deed. The effect of this case is "that if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, it is nevertheless not his deed";⁷⁷ it was also resolved that "it is all one in law to read it in other words, and to declare the effect thereof in other manner than is contained in the writing": but that a party executing a deed without requiring it to be read or to have its effect explained would be bound.⁷⁸ Agreeably to this the law is stated in Sheppard's Touchstone, 56. But at present the mere reading over of a deed without an explanation of the contents, to a person incapable of reading it for himself, would hardly be thought sufficient to show that the person executing it understood what he was going.⁷⁹

The doctrine was expounded and confirmed by the luminous judgment of the Court of Common Pleas in *Foster v. Mackinnon*.⁸⁰ The action was on a bill of exchange against the defendant as indorser. There was evidence that the acceptor had asked the

⁷⁵ The German Civil Code has taken a new and much simplified course on the whole matter. Any kind of "declaration of intention" is voidable on the ground of fundamental error, even if the mistake is unilateral; but voidable only, and subject to the duty of compensating any party for damage incurred by relying on the validity of the Act: B. G. B. ss. 119—122.

⁷⁶ (1581-2) 2 Co. Rep. 9 b. Cp. *Shutter's case*, 12 Co. Rep. 90 (deed falsely read to a blind man).

⁷⁷ Per Cur. in *Foster v. Mackinnon* (1869), L. R. 4 C. P. 711. It had been long before said, in 21 Hen. VII, that "if I desire a man to enfeof me of an acre of land in Dale, and he tell me to make a deed for one acre with letter of attorney, and I make the deed for two acres, and read and declare the deed to him as for only one acre, and he seal the deed, this deed is utterly void whether the feoffor be lettered or not, because he gave credence to me and I deceived him." (Keilw. 70, b, pl. 6): but *qu.* whether this can be accepted to the full extent since *Howatson v. Webb* [1908] 1 Ch. 1; 77 L. J. Ch. 32. Keilwey is in fact only a commonplace book, though it seems generally accurate. And see the older authorities referred to in note ⁸³, next page.

⁷⁸ *I.e.* to this extent, that he could not say it was not his deed, apart from any question of fraud or the like.

⁷⁹ *Hoghton v. Hoghton* (1852) 15 Beav. 278, 311; 92 R. R. 421, 435. In the case of a will the execution of it by a testator of sound mind after having it read over to him is evidence, but not conclusive evidence, that he understood and approved its contents: *Fulton v. Andrew* (1875) L. R. 7 H. L. 448, 460 *seq.*, 472; 44 L. J. P. 17.

⁸⁰ (1869) L. R. 4 C. P. 704, 711; 38 L. J. C. P. 310; [applied in *Lewis v. Clay* (1897) 67 L. J. Q. B. 224].

defendant to put his name on the bill, telling him it was a guaranty; the defendant signed on the faith of this representation and without seeing the face of the bill. The Court held that the signature was not binding, on the same principle that a blind or illiterate man is not bound by his signature to a document whose nature is wholly misrepresented to him.

A signature so obtained

"Is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended" . . . The position that if a grantor or covenantor be deceived or misled as to the *actual contents* of the deed, the deed does not bind him, is supported by many authorities: see *Com. Dig. Fait* (B. 2),⁸¹ and is recognized by Bayley B. and the Court of Exchequer in the case of *Edwards v. Brown*.⁸² Accordingly, it has recently been decided in the Exchequer Chamber that, if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor: *Swan v. North British Australasian Co.*⁸⁴ These cases apply to deeds; but the principle is equally applicable to other written contracts."

The judgment proceeds to notice the qualification of the general rule in the case of negotiable instruments signed in blank, *when the party signing knows what he is about, i.e., that the paper is afterwards to be filled up as a negotiable instrument.*" But here the defendant "never intended to endorse a bill of exchange at all, but intended to sign a contract of an entirely different nature." He was no more bound than if he had signed his name on a blank sheet of paper, and the signature had been afterwards fraudulently misapplied.⁸⁶ This decision shows clearly that an instrument

⁸¹ The same rule is laid down, and for the same reason, in a rescript of Diocletian and Maximian: Si falsum instrumentum emptiois conscriptum tibi, velut locationis quam fieri mandaveras, subscribere te non relecto sed fidem habentem suasit, neutrum contractum, in utroque alterutrius consensu deficiente, constituisse procul dubio est. C. 4. 22. plus valere, 5.

⁸² Cited also by Willes J. 2 C. B. N. S. 624; and see 2 Ro. Ab. 28 S.: the cases there referred to (30 E. III. 31 b; 10 H. VI. 5, pl. 10) show that the principle was recognized in very early times. Cp. Fleta 1. 6, c. 33 § 2. Si autem vocatus dicat quod carta sibi nocere non debeat . . . vel quia per dolum advenit, ut si cartam de feoffamento sigillatam [quæ sigillavit or sigillaverit] cum scriptum de termino annorum sigillare crediderit, vel ut si carta fieri debuit ad vitam illam, fieri fecit in feodo et huiusmodi, dum tamen nihil sit quod imperitiæ vel negligentiae suæ possit imputari, ut [si] sigillum suum senescallo tradiderit vel uxori, quod cautius debuit custodivisse. *Quære* whether the old authorities as to "non est factum" are applicable to educated and seeing persons, see *Howatson v. Webb* [1908] 1 Ch. 1, 3, 4. At all events it would be rash to dispute the authority of *Foster v. Mackinnon* though it has been suggested that in the particular case the difference was not substantial.

⁸³ (1831) 1 C. & J. 307, 312; 35 R. R. 720, 725.

⁸⁴ (1863) 2 H. & C. 175; 32 L. J. Ex. 273; 126 R. R. 617. The suggestion there made that mere negligence will not estop a man from showing that a deed is not really his deed is now confirmed by the C. A., see note ⁸⁷.

⁸⁵ Whether this is a branch of the general principle of estoppel or a positive rule of the law merchant was much doubted in *Swan v. North British Australasian Co.* (1862) in the Court below, 7 H. & N. 603; 31 L. J. Ex. 425; 126 R. R. 580. In the present judgment the Court of C. P. seems to incline to the latter view.

⁸⁶ L. R. 4 C. P. at 712.

executed by a man who meant to execute not any such instrument but something of a different kind is in itself a mere nullity; and that, notwithstanding the importance constantly attached by the law to the security of *bona fide* holders of negotiable instruments, the only exception made in their favour is that a party who knows he is executing something negotiable may be estopped by negligence. Apart from the case of a negotiable instrument no such exception is allowed.⁸⁷ [American law seems to be to the like effect.⁸⁸]

The existence of a fundamental error of this sort, not merely as to particulars, but as to the nature and substance of the transactions, has seldom been considered by courts of equity except in connection with questions of fraud from which it is not always practicable to disentangle the previous question whether there was any consenting mind at all: and a just zeal to restrain fraudulent practices has now and then led to the utterance of *dicta* not wholly according to knowledge.⁸⁹ Evidently there cannot be such a thing as a peculiar doctrine of equity as to the passing of legal estates or the creation of legal obligations.

An instrument, then, may be wholly void as against a party who has executed it under a total misapprehension of its nature, being put off inquiry by fraud or, it may be, other plausible cause;⁹⁰ but

⁸⁷ *Carlisle and Cumberland Banking Co. v. Bragg* [1911] 1 K. B. 489; 80 L. J. K. B. 472, C. A. The decision was severely criticized by Sir W. Anson, L. Q. R. xxviii, 190, but his ingenious attempt to distinguish *Swan's* case cannot stand against the unanimous decision of a strong Court affirming the judgment of Lord Sterndale (later M.R., then Pickford J.). Here the document before the Court was a guarantee to a bank, fraudulently stated to the defendant to be a duplicate of a spoilt insurance form, which it appears he had signed earlier, and signed by him without examination on the faith of that statement. Estoppel was relied on for the plaintiffs (the jury having found as a fact that the defendant was negligent), but the Court held that the defendant was under no such duty to the plaintiffs as could create an estoppel. *Cp. Simons v. Great Western Ry. Co.* (1857) 2 C. B. N. S. 620; 109 R. R. 806, where the plaintiff was not held bound by a paper of special conditions limiting the company's responsibility as carriers, which he had signed without reading it, being in fact unable at the time to read it for want of his glasses, and being assured by the railway clerk that it was a mere form. "The whole question was whether the plaintiff signed the receipt knowing what he was about"; per Cockburn C.J. at 624. The clerk's statement distinguishes this from the class of cases dealt with at pp. 40—43. Where a person intending to execute his will has by mistake executed a wrong document, that document cannot be admitted to probate even if the real intention would thereby be partially carried out: *In the goods of Hunt* (1875) L. R. 2 P. & D. 250; 44 L. J. P. 43.

⁸⁸ [Williston, *Contracts*, § 1488; Restatement of Contracts, §§ 475, 476.]

⁸⁹ *Kennedy v. Green* (1834) 3 M. & K. 699; 41 R. R. 176 (Lord Brougham); *Vorley v. Cooke* (1857) 1 Giff. 230; 27 L. J. Ch. 185; 114 R. R. 413; *Ogilvie v. Jeaffreson* (1860) 2 Giff. 353; 29 L. J. Ch. 905; 128 R. R. 148 (Stuart V.-C.). Neither of those judges is a safe warrantor for speculative extensions of either legal or equitable doctrine; but the real ground of all these decisions was constructive notice of the fraud, though in *Vorley v. Cooke* this appears only from the Law Journal report, which differs materially from Giffard's. Lord Brougham seems never to have understood that a purchaser for valuable consideration without notice asks nothing of a court of equity but to leave him alone.

⁹⁰ In *Oriental Bank Corporation v. Fleming* (1879) 1 L. R. 3 Born. 242, a composition deed including a release which was not authorised was executed on behalf of creditors; time was pressing and examination of the deed was waived on the debtor's assurance that all was as agreed; the High Court decreed that it was not the deed of the plaintiffs so far as it purported to operate as a release. Fraud was not alleged, but no right had been acquired by any third party on the faith of the release.

misapprehension of the effect or contents, when the party knows what he is dealing with, is not enough; and it seems that a man of ordinary education and competence, if, knowing so much, he chooses to execute an instrument without informing himself of its general purport and effect, does so at his peril as regards innocent third persons, whatever remedies he may have against any other party to the transaction."¹

"When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed because he is told it is a mere form and has such confidence in his solicitor as to execute the deed in ignorance, then a deed so executed, although it may be voidable upon the ground of fraud, is not a void deed."²

Accordingly a man who executes a mortgage containing the usual covenants, and knows that he is transferring the property but assumes that it is an out and out conveyance, is liable on the covenant for payment of principal and interest to a transferee for value:³ and similarly a conveyance from A. to B., purporting to grant that which A. had already conveyed to B. by deed, and being obtained by B.'s fraud, is not void as a deed, and may create an estate by estoppel if it contains sufficiently clear averments.⁴

A contractor must stand by the words of his contract, and, if he will not read what he signs, he alone is responsible for his omission;⁵ at all events a party to an agreement by which he undertakes liabilities of a known kind cannot repudiate it because a clause which he did not read includes more than he intended.⁶ And it may be said generally that a man of business who executes "an instrument of a short and intelligible description cannot be permitted to allege that he executed it in blind ignorance of its real character."⁷ Strictly this may be an inference of fact rather than a rule of law; but under such conditions the inference is irresistible. It may be observed, however, that a prudent man who has examined and approved the draft of a deed to which he is a party does not, as a rule, insist on verifying with his own eyes the exact correspondence of the engrossment with the draft; and

¹ *Hunter v. Walters* (1871) L. R. 7 Ch. 75; *Howatson v. Webb* [1908] 1 Ch. 1; 77 L. J. Ch. 32, C. A.

² *Hunter v. Walters* (1871) L. R. 7 Ch. 75; per Mellish L.J. at 88; cp. *Nat. Prov. Bank of England v. Jackson* (1886) 33 Ch. Div. 1; and *Lloyds Bank Ltd. v. Bullock* [1896] 2 Ch. 192, 196; 65 L. J. Ch. 680.

³ *Howatson v. Webb*, note ¹. The C. A. did not approve of a distinction between the effects of a conveyance and covenant in such circumstances suggested by Swinfen Eady J. in *Bagot v. Chapman* [1907] 2 Ch. 222, 227; 76 L. J. Ch. 523, where the actual decision was on the ground of total misrepresentation: see [1908] 1 Ch. at 2, 3; and *qu.* therefore whether in *Oriental Bank Corporation v. Fleming*, note ⁵, the sufficient alternative ground of decision, that the debtor's misrepresentation even if innocent made the deed voidable, was not the sounder.

⁴ *Onward Building Soc. v. Smithson* [1893] 1 Ch. 1; 62 L. J. Ch. 138, C. A., a peculiar case, where the plaintiffs, having lent money to B. on a pretended mortgage of the land named in his second conveyance, were held, in the absence of estoppel (which mere inference will not create) not entitled to sue A. on his covenant for title.

⁵ *Upton v. Tribilcock* (1875) 91 U. S. 45, 50.

⁶ *Blay v. Pollard* [1930] 1 K. B. 628; 99 L. J. K. B. 421.

⁷ Per Lord Chelmsford C. *Wythes v. Labouchere* (1858-9) 3 De G. & J. 593, 601.

it would surprise both branches of the profession in England if it were held to be negligence for a man to trust his solicitor to that extent."

AS TO CHARACTER OF TRANSACTION

There may also be a fundamental error affecting not the whole substance of the transaction, but only its legal character. It is apprehended that on principle a case of this kind must be treated in the same way as those we have already considered; that is, if the two parties to a transaction contemplate wholly different legal effects, there is no agreement; but this will not prevent an act done by either party from having any other effect which it can have by itself and which it is intended to have by the party doing it.

Thus if A. gives money to B. as a gift, and B. takes it as a loan, B. does not thereby become A.'s debtor,⁹⁹ but the money is not the less effectually delivered to B.¹ So, if a baker who has ordered flour of A.'s received by a warehouseman's mistake flour of B.'s, which is more valuable, and consumes it in good faith, he is not liable for B. for the true value.²

We have seen however (p. 365), that mistake as to any particular effect of a contract depending on its true construction does not discharge the contracting party or entitle him to act upon his own erroneous construction.

2.—ERROR AS TO THE PERSON OF THE OTHER PARTY^{2a}

Another kind of fundamental error is that which relates to the person with whom one is contracting. Where it is material for the one party to know who the other is, this prevents any real agreement from being formed.¹ Such knowledge is in fact not material in a great part of the daily transactions of life, as for instance when goods are sold for ready money, or when a railway traveller takes his ticket: and then a mere absence of knowledge caused by complete indifference as to the person of the other party cannot be

⁹⁸ Cp. per Malins V.-C. (who knew the common course of business very well, if his law was sometimes adventurous) L. R. 9 Eq. at 603.

⁹⁹ But if B. communicates to A. his intention of treating the money as a loan, and A. assents, then there is a good contract of loan. See *Hill v. Wilson* (1873) L. R. 8 Ch. 888; per Mellish L.J. at 896; where it was held that an advance at first intended to be a gift had in this way been turned into a loan, and was a good consideration for a promissory note subsequently given for the amount.

¹ Savigny, Syst. 3. 269; Paulus, D. 44, 7. de o. et a. 3 § 1. But a wholly mistaken handing over of money or goods passes no property: *R. v. Middleton* (1873) L. R. 2 C. C. R. 38, 44; 42 L. J. M. C. 73; *Kingsford v. Merry* (1856) (Ex. Ch.) 1 H. & N. 503; 26 L. J. Ex. 83; 108 R. R. 694; and see *Chapman v. Cole* (1858) 12 Gray (Mass.) 141; *R. v. Ashwell* (1885) 16 Q. B. D. 190; 55 L. J. M. C. 65.

² *Hills v. Snell* (1870) 104 Mass. 173; cp. the somewhat similar case put by Bramwell B. in *R. v. Middleton* (1873) L. R. 2 C. C. R. at 56.

^{2a} [See Dr. Glanville Williams in 23 Canadian Bar Review, 271—292, 380—416].

³ Savigny, Syst. 3. 269; Pothier, Obl. § 19, adopted by Fry J. in *Smith v. Wheatcroft* (1878) 9 Ch. D. at 230; 47 L. J. Ch. 745. If I take a loan from A. thinking he is B.'s agent to lend me the money when he is in truth C's there is no contract of loan, though C. may get back his money by *condictio*: D. 12. l. de reb. cred. 32. [See Prof. Goodhart in 57 L. Q. R. (1941) 228—244, "Mistake as to identity in the Law of Contract."]

considered as mistake, and there can be no question of this kind. In principle, however, the intention of a contracting party is to create an obligation between himself and another certain person, and if that intention fails to take its proper effect, it cannot be allowed to take the different effect of involving him without his consent in a contract with some one else. In other words, an offer made to one man cannot be accepted by another. [This is obviously so where the offeree knows that the offer is not intended for him. Where, however, such knowledge is lacking, the test seems to be, "Ought the offeree, as a reasonable person, to have known that the offer was not meant for him?" The answer to this necessarily depends on the facts of each particular case, and it must be confessed that the facts appear to have been oddly interpreted in some decisions.^{2a}]

In *Boulton v. Jones*¹ an order for goods had been addressed by the defendants to a trader named Brocklehurst, who without their knowledge had transferred his business to the plaintiff Boulton. The plaintiff supplied the goods without notifying the change, and after the goods had been accepted sent an invoice in his own name, whereupon the defendants said they knew nothing of him. It was held that there was no contract, and that he could not recover the price of the goods. Possibly the person for whom the order was meant might have adopted the transaction if he had thought fit. But with the plaintiff there was no express contract, for the defendants' offer was not addressed to him; nor yet an implied one, for the goods were accepted and used by the defendants on the footing of an express contract with the person to whom their offer was really addressed, for the defendants had a set-off against the person with whom they intended to contract.²

^{2a} [*E.g.*, *Phillips v. Brooks*, post p. 380, n.7].

¹ (1857) 2 H. & N. 464; 27 L. J. Ex. 117; 115 R. R. 695. And see *Boston Ice Co. v. Potter* (1877) 123 Mass. 28, where *Boulton v. Jones* was followed in its full extent. *Qu.* however whether according to general usage a proposal addressed to a trader at his place of business for the supply of goods in the way of that business be not, in the absence of anything showing special personal considerations, a proposal to whoever is carrying on the same business continuously at the same place and under the same name.

² [The point as to set-off appears more clearly in the report in 27 L. J. Ex. 117. Prof. Goodhart, in 57 L. Q. R. 234, urges that the test being, "How would the offer have been understood by a reasonable man in the position of the offeree?" the set-off was immaterial unless the plaintiff knew that the defendants were giving the order with this in mind. I suggest, however, that the set-off was material because a reasonable man in the plaintiff's position, on taking over the business from Brocklehurst, either would have discovered the existence of the set-off in the books of Brocklehurst or, if there were no record of it in them, would recognize that it would be unfair that the defendants should suffer by the absence of such a record. Dr. Cheshire's estimate of the case (in 60 L. Q. R. 185) seems to me correct]. Cp. *Mitchell v. Lapage* (1816) Holt N. P. 253; 17 R. R. 633, a somewhat similar case, where the purchaser, after notice, had treated the contract as subsisting. Analogous in some ways, but really having nothing to do with any rule specially relating to mistake, is the class of cases showing that a subsisting contract cannot be performed by a person with whom it was not made: *Robson v. Drummond* (1831) 2 B. & Ad. 303; 36 R. R. 569; *Humble v. Hunter* (1848) 12 Q. B. 310; 17 L. J. Q. B. 350; 76 R. R. 291. See further per Collins M.R. in *Tolhurst v. Assoc. Portland Cement Manufs.* [1902] 2 K. B. 660, 668; 71 L. J. K. B. 949.

Again, if A. means to sell goods to B., and C. obtains delivery of the goods by pretending to be B.'s agent to make the contract and receive the goods,⁶ or if C., who is a man of no means, obtains goods from A. by writing for them in the name of B., a solvent merchant already known to A., or one only colourably differing from it,⁷ there is not a voidable contract between A. and C., but no contract at all; no property passes to C., and he can transfer none (save in market overt) even to an innocent purchaser. The pretended sale fails for want of a real buyer. There is only an offer on A.'s part to the person with whom alone he means to deal and thinks he is dealing. It appears doubtful whether any analogous doctrine applies to deeds, so that the insertion of a wrong party, if material, would have the same result as the insertion of wrong parcels, and that if a man executes a conveyance of Whiteacre to A. as and for a conveyance of the same estate to B. it is equally not his deed. But neither *Hunter v. Walters*⁸ nor the later authorities already mentioned encourage such an extension.

Conversely, if Z. knows that A. for some reason, good or bad, is minded to except Z from his general willingness to do business with all comers who satisfy the conditions—as where A., the manager of a theatre, refused to let Z book a seat for a first night, on the ground that Z. had made unfounded charges against the staff of the theatre—there Z. cannot make himself a contracting party as the undisclosed principal of an indifferent agent: as in the actual case by employing an unsuspected person to take the seat in his own name.⁹ On the same principle it was decided earlier in *Gordon v. Street*¹⁰ that wilful concealment of a party's

⁶ *Hardman v. Booth* (1863) 1 H. & C. 803; 32 L. J. Ex. 105; 130 R. R. 784; cp. *Kingsford v. Merry* (1856) 1 H. & N. 503; 26 L. J. Ex. 83; 108 R. R. 694; *Hollins v. Fowler* (1874-5) L. R. 7 H. L. 757, 763, 795.

⁷ *Lindsay v. Cundy*, *Cundy v. Lindsay* (1878) 3 App. Ca. 459; 47 L. J. Q. B. 481. *Ex parte Barnett* (1876) 3 Ch. D. 123; 45 L. J. Bk. 120. So, if a man is persuaded to join a new company by fraudulently representing it to be identical with an older company of similar name, he does not become a shareholder: *Baillie's case* [1898] 1 Ch. 110; 67 L. J. Ch. 81. According to *Edmunds v. Merchants' Despatch Transport Co.*, 135 Mass. 283, if A. in person obtains goods by pretending to be B., then, as A. is "identified by sight and hearing," property does pass; followed here, *Phillips v. Brooks* [1919] 2 K. B. 243; 88 L. J. K. B. 953; *contra* Pothier, Obl. § 19. But these decisions do not seem acceptable. Seeing a man does not tell one who he really is any more than knowing his name enables one to recognize him at sight. See a full criticism in 44 L. Q. R. (1928), 72—77, by Prof. C. K. Allen, pointing out that the "sight and hearing" doctrine will not stand with the reasons given in *Lake v. Simmons* [1927] A. C. 487; 96 L. J. K. B. 621, especially Lord Sumner's and Lord Atkinson's. [*Phillips v. Brooks* is also criticized in *Almond & Winfield, Contracts*, 188—189, where the question as to deception by a telephonic message is also raised. See also Dr. Cheshire in 60 L. Q. R. 186.]

⁸ (1871) L. R. 7 Ch. 75; p. 377. On the other hand, "if A. personating B. executes a deed in the name of B. purporting to convey B.'s property, no right or interest can possibly pass by such an instrument. It is not a deed. It makes no difference in law that A. had the same name as B. if the false personation is established; still the instrument is not a deed, and that plea would be a complete answer by B. or any one claiming through him": *Re Cooper* (1882) 20 Ch. Div. 611, 623; 51 L. J. Ch. 862 (Kay J.); *affd.* in C. A. 20 Ch. Div. 627; followed. *Re De Lennu* [1922] 2 Ch. 540; 91 L. J. Ch. 617.

⁹ *Said v. Butt* [1920] 3 K. B. 497; 90 L. J. K. B. 239.

¹⁰ [1899] 2 Q. B. 641; 69 L. J. Q. B. 45, C. A..

identity even in a contract in which personal considerations are usually irrelevant may, in special circumstances (such as that party having acquired in his own name a reputation that makes people unwilling to deal with him), amount to fraud, making the contract voidable; [in this case a moneylender, notorious for sharp and oppressive dealing, masked his identity by adopting the name of a person whom the Court assumed to be fictitious; and the Court expressed an opinion that, apart from its voidability for fraud, the contract was void for essential error as to the identity of the person with whom it was made.^{10a} In *Sowler v. Potter*, on similar facts, the contract was actually held void for mistake^{10b}].

In like manner a party to whom anything is due under a contract is not bound to accept satisfaction from any one except the other contracting party, in person where the nature of the contract requires it,¹¹ or otherwise by himself, his personal representatives, or his authorized agent: and it has even been thought that the acceptance of satisfaction from a third person is not of itself a bar to a subsequent action upon the contract. It seems that the satisfaction must be made in the debtor's name in the first instance and be capable of being ratified by him,¹² and that if it is not made with his authority at the time there must be a subsequent ratification, which however need not be made before action.¹³ But these

^{10a} [[1899] 2 Q. B. at p. 648. The opinion can only have been an *obiter dictum*, for otherwise it would have involved holding that, on the same set of facts and in the same action, the contract was both void and voidable. No doubt the same set of facts may constitute (1) a mistake which makes the contract void, and (2) fraud which makes the contract voidable; and there is no objection to the party, who has been deceived, basing his case wholly on (1) or wholly on (2); but if he bases it alternatively on (1) or (2), it would be a contradiction in terms if he were awarded judgment on both grounds. Hence, in *Sowler v. Potter* [1940] 1 K. B. 271; 109 L. J. K. B. 177; [1939] 4 All E. R. 478 (the last mentioned report gives fuller information on some points) where the Court held that the contract was void for mistake and also awarded damages for fraudulent misrepresentation, it must be presumed that the claim for fraudulent misrepresentation was founded on tort and not upon breach of contract.]

^{10b} [References to reports of this case are given in note ^{10a} ante. Both the decision in this case and the *obiter dictum* in *Gordon v. Street* (text *supra*) seem to me sound. Prof. Goodhart (57 L. Q. R. 241-244; see, too, Dr. Cheshire in 60 L. Q. R., 186-187) thinks otherwise chiefly because he regards them as inconsistent with *King's Norton Metal Co., Ltd. v. Edridge, Merrell & Co., Ltd.* (1897) 14 T. L. R. 98 (C. A.), where the contract was held to be merely voidable. I venture to think that there is no inconsistency. In the *King's Norton* case, A. fraudulently assumed the name of a firm, which apparently had no existence, in order to get goods supplied to him by B. without any intention of paying for them. In an earlier transaction with B., A. had paid B. for the goods then supplied by a cheque drawn in the name of this firm and the cheque had been honoured. This must have been a material fact in leading the Court to hold that the mistake as to the identity of A. was not so essential as to avoid the later contract, although it was voidable for fraud. As to *Gordon v. Street*, A. L. Smith, L. J. (who was also a party to the decision in the *King's Norton* case) said in *Gordon's* case ([1899] 2 Q. B. at p. 644) that its facts were totally unlike the case of a person "trading under a firm's name."]

¹¹ See *Robinson v. Davison* (1871) L. R. 6 Ex. 269; 40 L. J. Ex. 172.

¹² *James v. Isaacs* (1852) 12 C. B. 791; 22 L. J. C. P. 73; 92 R. R. 883; *Lucas v. Wilkinson* (1856) 1 H. & N. 420; 26 L. J. Ex. 13; 108 R. R. 657.

¹³ *Simpson v. Eggington* (1856) 10 Ex. 845; 24 L. J. Ex. 312; 102 R. R. 867 (ratification by plea of payment or at the trial may be good). [Cf. *Smith v. Cox* [1940] 2 K. B. 558; 109 L. J. K. B. 732.]

refinements have not been received without doubt:¹⁴ and it is submitted that the law cannot depart in substance, especially now that merely technical objections are so little favoured, from the old maxim "If I be satisfied it is not reason that I be again satisfied."¹⁵

So far the rule of common law. The power of assigning contractual rights does not constitute an exception. For we are now concerned only to ascertain the existence or non-existence of a binding contract in the first instance. But the limits set to this power (which we have already considered under another aspect)¹⁶ may here be shortly referred to as illustrating the same principle.

Generally speaking, the liability on a contract cannot be transferred so as to discharge the person or estate of the original contractor, unless the creditor agrees to accept the liability of another person instead of the first.¹⁷

The benefit of a contract can generally be transferred without the other party's consent, yet not so as to put the assignee in any better position than his assignor.¹⁸ Hence the rule that the assignee is bound by all the equities affecting what is assigned. Hence also the "rule of general jurisprudence, not confined to choses in action . . . that if a person enters into a contract, and without notice of any assignment fulfils it to the person with whom he made the contract, he is discharged from his obligation,"¹⁹ and the various consequences of its application in the equitable doctrines as to priority being gained by notice.

Again, rights arising out of a contract cannot be transferred if if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.²⁰ [Where A. is employed by B. for personal services, whether the relation involves personal confi-

¹⁴ See per Willes J. in *Cook v. Lister* (1863) 13 C. B. N. S. 543, 594; 32 L. J. C. P. 121; 134 R. R. 642, 668, who considered the doctrine laid down in *Jones v. Broadhurst* (next note) that payment by a stranger is no payment till assent, as contrary to a well-known principle of law: the civil law being the other way expressly, and mercantile law by analogy: at the least assent ought to be presumed (cp. L. R. 10 Ch. 416.)

¹⁵ Fitzh. Ab. tit. Barre, pl. 166, repeatedly cited in the modern cases where the doctrine is discussed. See in addition to those already referred to, *Jones v. Broadhurst* (1850) 9 C. B. 173; 82 R. R. 336; *Belshaw v. Bush* (1851) 11 C. B. 191, 267; 22 L. J. C. P. 24; 87 R. R. 639. [Williston, Contracts, after discussing the English authorities (§ 1857) states (§ 1858) that in the United States the weight of authority favours the view that payment by a third person is a good defence. The Restatement of Contracts, § 421, is to the like effect, but with the qualification that the debtor has the power of disclaimer, within a reasonable time, to make this discharge inoperative.]

¹⁶ Ch. 5. p. 170 sqq.

¹⁷ See p. 160.

¹⁸ Or the party in a worse one than he was before: *Tolhurst v. Associated Portland Cement Manufacturers* [1901] 2 K. B. 811; 70 L. J. K. B. 1036 (reversed on grounds not affecting the general principle [1902] 2 K. B. 660; [1903] A. C. 414; 71 L. J. K. B. 834).

¹⁹ Per Willes J. *De Nicholls v. Saunders* (1870) L. R. 5 C. P. 589 at 594; 39 L. J. C. P.

²⁰ statement was approved by the Supreme Court of the U.S. in *Arkansas Smelting Co. v. Belden Co.* (1888) 127 U. S. 379, 388.

dence or not, B. cannot, without A's consent, transfer the right to A.'s services to C.²¹] Thus one partner cannot transfer his share so as to force a new partner on the other members of the firm without their consent: all he can give to an assignee is a right to receive what may be due to the assignor on the balance of the partnership accounts, and if the partnership is at will, the assignment dissolves it; if not, the other partners may treat it as a ground for dissolution. And a sub-partner has no rights against the principal firm.

"At the present day, no doubt, an agreement to pay money, or to deliver the goods may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent."²²

In the same way a contract of apprenticeship is *prima facie* a strictly personal contract with the master; this construction may be excluded however by the intention of the parties, *e.g.*, if the master's executors are expressly named,²³ or by custom.²⁴

So if an agent appoints a sub-agent without authority, the sub-agent so appointed is not the agent of the principal and cannot be an accounting party to him.²⁵ On the same principle it was held in *Stevens v. Benning*²⁶ that a publisher's contract with an author was not assignable without the author's consent. The plaintiffs, who sought to restrain the publication of a new edition of a book, claimed under instruments of which the author knew nothing, and which purported to assign to them all the copyrights, &c., therein mentioned (including the copyright of the book in question) and all the agreements with authors, &c., in which the assignors, with whose firm the author had contracted, were interested. It was decided that the instrument relied on did not operate as an assignment of the copyright, because on the true construction of the original agreement with the publishers the author had not parted with it: also that it did not operate as an assignment of the contract, because it was a personal contract, and it could not be indifferent to the author into whose hands

²¹ [*Nokes v. Doncaster Amalgamated Collieries, Ltd.* [1940] A. C. 1014; 109 L. J. K. B. 865: "I had fancied," said Lord Atkin (at 1026), "that ingrained in the personal status of a citizen . . . was the right to choose for himself whom he would serve: and that this right of choice constituted the main difference between a servant and a serf."]

²² *Per Cur. Gray J. Arkansas Smelting Co. v. Belden Co.* (1888) 127 U. S. 379, 387.

²³ *Cooper v. Simmons* (1862) 7 H. & N. 707; 31 L. J. M. C. 138; 126 R. R. 653.

²⁴ *Bac. Abr. Master and Servant, E.*

²⁵ *Cartwright v. Hately* (1791) 1 Ves. jun. 292. *Cp.* Indian Contract Act, 1872, s. 193.

²⁶ (1854-5) 1 K. & J. 168; 6 D. M. G. 223; 106 R. R. 90; followed in *Hole v. Bradbury* (1879) 12 Ch. D. 886, and applied to an incorporated company, *Griffith v. Tower Publishing Co.* [1897] 1 Ch. 21; 66 L. J. Ch. 12. [*Cf. Messenger v. British Broad-casting Co.* [1929] A. C. 151; 98 L. J. K. B. 189.]

his interests under such an engagement were entrusted. In the plaintiffs, however trustworthy, the author had not agreed or intended to place confidence: with them, however respectable, he had not intended to associate himself.²⁷ Similarly where persons contract to sell land as trustees, and it appears that their power to sell arises only on the death of a tenant for life who is still living, they cannot require the purchaser to take a conveyance from the tenant for life, from whom he never agreed to buy. This would be not merely adding a party to the conveyance, but forcing a wholly new contract on the purchaser.²⁸

The law of agency, which we have already had occasion to consider,²⁹ presents much more important and peculiar exceptions. Here again we find that the limitations under which those exceptions are admitted show the influence of the general rule; thus a party dealing with an agent for an undisclosed principal is entitled as against the principal to the benefit of any defence he could have used against the agent.

3.—ERROR AS TO THE SUBJECT-MATTER

There may be fundamental error concerning:—

A. The specific thing supposed to be the subject of the transaction.

B. The kind or quantity by which the thing is described, or some quality which is a material part of the description of the thing, though the thing be specifically ascertained.

The question however is in substance always the same, and may be put in this form: It is admitted that the party intended to contract in this way for something; but is this thing that for which he intended to contract? The rule governing this whole class of cases is fully explained in the judgment of the Court of Queen's Bench in the case of *Kennedy v. Panama, &c. Mail Company*.³⁰ There were cross actions, the one to recover instalments paid on shares in the company as money had and received, the other for a call on the same shares. The contention on behalf of the shareholder was "that the effect of the prospectus was to warrant to the intended shareholders that there really was such a contract as is there represented,"³¹ and not merely to represent that the company *bona fide* believed it; and that the difference in substance between shares in a company with such a contract and shares in a company whose supposed contract was not binding, was a difference in substance in the nature of the thing; and that the shareholder was entitled to return the shares as soon as he dis-

²⁷ See 6 D. M. G. at 229; 106 R. R. 93, 94.

²⁸ *Bryant and Barningham's Contract* (1890) 44 Ch. Div. 218; 59 L. J. Ch. 636.

²⁹ Ch. 2, p. 78.

³⁰ (1867) L. R. 2 Q. B. 580; 36 L. J. Q. B. 260.

³¹ A contract with the postmaster-general of New Zealand on behalf of the Government, which turned out to be beyond his authority.

covered this, quite independently of fraud, on the ground that he had applied for one thing and got another."³²

The Court allowed it to be good law that if the shares applied for were really different in substance from those allotted, this contention would be right. But it is an important part of the doctrine³³ that the difference in substance must be complete. In the case of a fraud, a fraudulent representation of any fact material to the contract gives a right to rescission; but the misapprehension which prevents a valid contract from being formed must go to the root of the matter. In this case the misapprehension was not such as to make the shares obtained substantially different from the shares described in the prospectus and applied for on the faith of that description.³⁴ It was at most like the purchase of a chattel with a collateral warranty, where a breach of the warranty gives an independent right of action, but in the absence of fraud is no ground for rescinding the contract.³⁵

In the particular case of taking shares in a company the contract is not in any case void, but only voidable at the option of the shareholder if exercised within a reasonable time; this, although in strictness an anomaly, is required for the protection of the company's creditors, who are entitled to rely on the register of shareholders.³⁶

We reserve for the present the question how the legal result is affected when the error is due to a representation made by the other party. The exposition of the general principle, however, is not the less valuable: and we now proceed to give instances of its application in the branches already mentioned.

A. ERROR AS TO THE SPECIFIC THING (IN CORPORE)

A singular case of this kind is *Raffles v. Wichelhaus*.³⁷ The declaration averred an agreement for the sale by the plaintiff to the defendants of certain goods, to wit, 125 bales of Surat cotton, to arrive ex "*Peerless*," from Bombay, and arrival of the goods by the said ship: Breach, non-acceptance. Plea, that the defendants meant a ship called the "*Peerless*," which sailed from Bombay in October, and that the plaintiff offered to deliver, not any cotton which arrived by that ship, but cotton which arrived by a different ship also called the "*Peerless*," and which sailed from Bombay

³² Per Cur. L. R. 2 Q. B. at 586.

³³ In Roman Law as well as in the Common Law, *ibid.* at 588, citing D. 18. 1. de cont. empt. 9, 10, 11. By a clerical error the statement of Ulpian (*h. t.* 14) "*Si autem aes pro auro veneat, non valet*," is ascribed to Paulus in the report.

³⁴ So, where new stock of a company is issued and purchased on the supposition that it will have a preference which in fact the company had no power to give to it, this does not amount to a generic difference between the thing contracted for and the thing purchased: *Eaglesfield v. Marquis of Londonderry* (1876) 4 Ch. Div. 693.

³⁵ *Street v. Blay* (1831) 2 B. & Ad. 456; 36 R. R. 626.

³⁶ See cases cited, p. 388.

³⁷ (1864) 2 H. & C. 906; 33 L. J. Ex. 160; 133 R. R. 853.

in December. The plea was held good, for "the defendant only bought that cotton which was to arrive by a particular ship"; and to hold that he bought cotton to arrive in any ship of that name would have been "imposing on the defendant a contract different from that which he entered into."³⁹ Misunderstanding of an offer made by word of mouth might conceivably have a like effect, but obviously is, and ought to be, difficult to prove.⁴⁰ Unconditional acceptance of an offer which in fact is ambiguous and has been misunderstood will not make the acceptor liable for not having acted on the proposer's intention; nor can the acceptor hold the proposer liable on a construction which he did not not intend.⁴⁰

In *Malins v. Freeman*⁴¹ specific performance was refused against a purchaser who had bid for and bought a lot different from that he intended to buy: but the defendant had acted with considerable negligence, and the question was left open whether there was not a valid contract on which damages might be recovered. In a similar case of *Van Praagh v. Everidge*⁴² the Court of Appeal went on the ground that there was no signed memorandum of the contract, owing to a variance from the real date in the printed form which the auctioneer, on the defendant refusing to sign, purported to sign as his agent, but at least one member of the Court thought there was no real agreement. In *Calverley v. Williams*⁴³ the description of an estate sold by auction included a piece which appeared not to have been in the contemplation of the parties, and the purchaser was held not to be entitled to a conveyance of this part. "It is impossible to say, one shall be forced to give that price for part only, which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only. . . . The question is, does it appear to have been the common purpose of both to have conveyed this part?" A mistake as to the contents of a lot put up for sale, arising from mere want of attention to the particulars and a plan therein referred to and exhibited in the sale room, is no defence against an action for specific performance.⁴⁴ There remains a peculiar group of cases where the Court has seen its way to a middle course.

³⁹ Per Pollock C.B. and Martin B. 2 H. & C. at 207. The further questions which might have arisen on the facts are of course not dealt with; but cp. the American Law Institute's Restatement of the Law of Contracts, ill. 1 to §71. Such a case can occur only where "the ordinary evidence as to the primary meanings of the words" used "shows that the words may bear more than one meaning, without showing in which of those meanings either party used them, so that we have a case of equivocation": Sir H. W. Elphinstone in L. Q. R. ii, 110.

³⁹ *Phillips v. Bistolfi* (1824) 2 B. & C. 511; 26 R. R. 433.

⁴⁰ *Falck v. Williams* [1900] A. C. 176; 69 L. J. P. C. 17, a very peculiar case of a code telegram wrongly construed.

⁴¹ (1896-7) 2 Keen, 25; 44 R. R. 178; *Dacre v. Gorges* (1825) 2 S. & St. 454; 25 R. R. 246, appears to belong to the same class.

⁴² [1902] 2 Ch. 266; 71 L. J. Ch. 598; reversed [1903] 1 Ch. 494; 72 L. J. Ch. 260.

⁴³ (1790) 1 Ves. jun. 210; 1 R. R. 118.

⁴⁴ *Tampin v. James* (1880) 15 Ch. Div. 215.

In *Harris v. Pepperell*⁴⁵ the vendor had actually executed a conveyance including a piece which he had not intended to sell, but which the defendant maintained he had intended to buy: Lord Romilly, acting in accordance with his own former decision in *Garrard v. Frankel*,⁴⁶ gave the defendant an option "of having the whole contract annulled or else of taking it in the form which the plaintiff intended." The converse case occurred in *Bloomer v. Spittle*,⁴⁷ where a reservation had been introduced by mistake. The Court, it seems, will not hold the plaintiff bound by the defendant's acceptance of an offer which did not express the plaintiff's real intention, and which the defendant could not in the circumstances have reasonably supposed to express it;⁴⁸ nor yet require the defendant to accept the real offer which was never effectually communicated to him, and which he perhaps would not have consented to accept: but will put the parties in the same position as if the original offer were still open.⁴⁹ The Court having come to the conclusion that the parties did not rightly understand each other, "it is not possible without consent to make either take what the other has offered."⁵⁰ This does not mean that a party who has accepted in good faith and in its natural sense a proposal made in explicit terms can be deprived of his right to rely on the contract merely because the proposer failed to express his own intention. In such a case the proposer is estopped from showing that his reasonably apparent meaning was not his real meaning.⁵¹

Similarly, "where the terms of the contract are ambiguous, and where, by adopting the construction put upon them by the plaintiff, they would have an effect not contemplated by the defendant, but would compel him to include in the conveyance property not intended or believed by him to come within the terms of the contract," and the plaintiff refuses to have the contract executed in

⁴⁵ (1867) L. R. 5 Eq. 1.

⁴⁶ (1862) 30 Beav. 445; 31 L. J. Ch. 604.

⁴⁷ (1872) L. R. 13 Eq. 427; 41 L. J. Ch. 369.

⁴⁸ This limitation is material: cp. *Paget v. Marshall* (1884) 28 Ch. Div. 255; 54 L. J. Ch. 575; with *Tamplin v. James* (1880) 15 Ch. Div. 215. Lord Romilly's judgments do not, in terms at any rate, sufficiently attend to the principle enforced in *Tamplin v. James*. More lately it has been said that these decisions can be supported only on the ground of fraud, per Farwell J. *May v. Platt* [1900] 1 Ch. 616; 69 L. J. Ch. 357; *Bloomer v. Spittle* was said by Neville J. to be unintelligible as reported, though not exactly on this point: *Beale v. Kyte* [1907] 1 Ch. 564; 76 L. J. Ch. 294.

⁴⁹ For the principle (whether it actually justifies the particular decisions or not) compare *Cloues v. Higginson* (next note) and *Leyland v. Illingworth* (1860) 2 D. F. J. 252-3. *McKenzie v. Hesketh* (1877) 7 Ch. D. 675; 47 L. J. Ch. 231, well shows the distinction between this class of cases and those where a true contract is carried out with abatement or compensation. In *Scott v. Littledale* (1858) 8 E. & B. 815; 27 L. J. Q. B. 201; 112 R. R. 791 (a case on an equitable plea under the C. L. P. Act), the point of mistake (*viz.* the vendors of a specific cargo showing the purchaser a sample which in fact was of a different bulk) did not go to the essence of the contract: the correspondence of the bulk to the sample was only a collateral term which the purchaser might waive if he chose. The vendors, therefore, were at all events not entitled to rescind the contract unconditionally.

⁵⁰ *Cloues v. Higginson* (1813) 1 Ves. & B. 524, 535; 12 R. R. 284.

⁵¹ *Tamplin v. James* (1880) 15 Ch. Div. 215.

the manner in which the defendant is willing to complete it, specific performance cannot be granted.⁵²

When a purchaser, being naturally misled by the vendor's plan even after a view, supposes a portion of property to be included which is of no considerable quantity, but such as to enhance the value of the whole, this is a "mistake between the parties as to what the property purchased really consists of" so material that the contract will not be enforced.⁵³

In this class of cases a simple misunderstanding on the buyer's part of the description of the property sold, if such as a reasonable and reasonably diligent man might fall into, may be enough to relieve him specifically performing the contract, though not from liability in damages.⁵⁴ A vendor is in the same position if his agent has by ignorance or neglect included in a contract for sale property not intended to be sold.⁵⁵ But, although the authorities admit the possibility that a mistake to which the vendor did not contribute, and which he could not be expected to perceive, may in circumstances of special hardship be a bar to specific performance,⁵⁶ it is certain that such cases are rare. One-sided mistake, we repeat only by way of abundant caution, will never of itself prevent the formation of a contract on which an action for damages will lie.

Variance between the objects of a company as described in the prospectus and in the memorandum of association does not entitle a person who has taken shares on the faith of the prospectus to say that the concern actually started was not that in which he agreed to become a partner, and to have his name removed from the register. The reason is that "persons who have taken shares in a company are bound to make themselves acquainted with the memorandum of association, which is the basis upon which the company is established."⁵⁷ It has been attempted to dispute the validity of a transfer of shares because the transferor had not the shares corresponding to the numbers expressed in the transfer, although he had a sufficient number of other shares in the company; but it was held that the transferee, who had in substance agreed to take fifty shares in the company, could not set up the mistake as against the com-

⁵² *Baxendale v. Seale* (1854) 19 Beav. 601; 24 L. J. Ch. 385; 105 R. R. 261. Cp. per Lord Eldon, *Stewart v. Alliston* (1815) 1 Mer. 26, 33; 15 R. R. 81; and per Sir W. Grant, *Higginson v. Clowes* (1808) 15 Ves. 516, 524; 10 R. R. 112.

⁵³ *Denny v. Hancock* (1870) L. R. 6 Ch. 1, 14. Note that here there was negligent misrepresentation going, in the opinion of the Court, to the verge of fraud.

⁵⁴ *Tamplin v. James* (1880) 15 Ch. Div. 215.

⁵⁵ *Alvanley v. Kinnaird* (1849) 2 Mac. & G. 1, 8; 86 R. R. 1. Cp. *Griffiths v. Jones* (1873) L. R. 15 Eq. 279; 42 L. J. Ch. 468.

⁵⁶ *Wood v. Scarth* (1855) 2 K. & J. 33; 110 R. R. 88, is the only authority which appears to have actually decided so much: *qu.* how far it would now be followed. As it was, the dismissal of the suit was without costs.

⁵⁷ Per Lord Chelmsford, *Oakes v. Turgand* (1867) L. R. 2 H. L. 325, 351; 36 L. J. Ch. 949, overruling some former decisions to the contrary. See acc. *Kent v. Freshold Land Co.* (1868) L. R. 3 Ch. 493; *Hare's case* (1869) L. R. 4 Ch. 503; *Challis's case* (1879-1) L. R. 6 Ch. 266; 40 L. J. Ch. 431; all showing that the contract is in such cases not void, but only voidable at the option of the shareholder, which must be exercised within a reasonable time. So, a person who applies for shares in a company not described as limited cannot afterwards be heard to say: that he did not mean to take shares in an unlimited company: *Perrett's case* (1873) L. R. 15 Eq. 250; 42 L. J. Ch. 305.

pany's creditors."⁵⁵ "The numbers of the shares are simply directory for the purposes" of enabling the title of particular persons to be traced; but one share, an incorporeal portion of the profits of the company, is the same as another, and share No. 1 is not distinguishable from share No. 2 in the same way as a grey horse is distinguishable from a black horse."⁵⁶

A compromise of an action has been avoided, where by misapprehension of counsel it extended to matters which his client and he thought were not in dispute.⁵⁷

B. ERROR AS TO KIND, QUANTITY, OR QUALITY OF THE THING

A material error as to the kind, quantity, or quality of a subject-matter which is contracted for by a generic description (whether alone or in addition to an individual description) may make the agreement void, either because there was never any real consent of the parties to the same thing, or because the thing or state of things to which they consented does not exist or cannot be realized.

In *Thornton v. Kempster*⁵⁸ the common broker of both parties gave the defendant as buyer a sale note for *Riga Rhine* hemp, but to the plaintiff as seller a note for *St. Petersburg clean* hemp. The bought and sold notes were the only evidence of the terms of sale. The Court held that "the contract must be on the one side to sell and on the other side to accept one and the same thing"; here the parties so far as appeared had never agreed that the one should buy and the other accept the same thing; consequently there was no agreement subsisting between them.

In a case of this kind however there is not even an agreement in terms between the offer and the acceptance.

In a curious case of error in quantity happened in *Henkel v. Pape*,⁵⁹ where by the mistake of a telegraph clerk an order intended to be for three rifles only was transmitted as an order for fifty. The only point in dispute was whether the defendant was bound by the message so transmitted, and it was held that the clerk was his agent only to transmit the message in the terms in which it was delivered to him. The defendant had accepted three of the fifty rifles sent, and paid the price for them into Court: therefore the question whether he was bound to accept any did not arise in this case. It is settled however by former authority that when goods ordered are sent together with goods not ordered, the buyer may refuse to

⁵⁵ *Ind's case* (1872) L. R. 7 Ch. 485; 41 L. J. Ch. 564.

⁵⁶ *Sic* in the report.

⁵⁷ Or house No. 2 in a street from house No. 4 in the same street, though of the same description and in equally good repair; *Leach v. Mullett* (1827) 3 Car. & P. 115; 33 R. R. 657.

⁵⁸ *Hickman v. Berens* [1895] 2 Ch. 638; 64 L. J. Ch. 785, C. A.; *Neale v. Gordon Lennox* [1902] A. C. 465; 71 L. J. K. B. 939, does not belong to this head, as it was decided on the ground not of mistake but of want of authority from the client.

⁵⁹ (1814) 5 Taunt. 786; 15 R. R. 658. So where by an oversight in preparing an auctioneer's catalogue the descriptions and samples of hemp and tow were mixed and the defendants made a bid for tow in the belief that it was hemp: *Scriven v. Hindley* [1913] 3 K. B. 564; 83 L. J. K. B. 40.

⁶⁰ (1870) L. R. 6 Ex. 7; 40 L. J. Ex. 15.

accept any, at all events "if there is any danger or trouble attending the severance of the two."⁶⁴

PRICE

The principle of error in quantity preventing the formation of a contract is applicable to an error as to the price of a thing sold or hired.⁶⁵ As there cannot be even the appearance of a contract when the acceptance disagrees on the face of it with the proposal, this question can arise only when there is an unqualified acceptance of an erroneously expressed or understood proposal. If the proposal is misunderstood by the acceptor, it is for him to show that the misunderstanding was reasonable. "Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake."⁶⁶ A. makes an offer to B. to take a lease of a named farm, specifying as its contents land amounting to 250 acres; B.'s agent, who meant to invite offers for only 200 acres, accepts A.'s offer without examining the particulars. Here there is a contract binding on B., and A. is entitled to specific performance to the extent of B.'s power to give it, with a proportionate reduction of the rent.⁶⁷

If, on the other hand, the proposal is by accident wrongly expressed, the proposer must show that the acceptor could not reasonably have supposed it in its actual form to convey the proposer's real intention. This occurred in *Webster v. Cecil*,⁶⁸ where the defendant sent a written offer to sell property and wrote 1,100*l.* for 2,100*l.* by a mistake in a hurried addition of items performed on a separate piece of paper. This paper was kept by him and produced to the Court. On receiving the acceptance he discovered the mistake and at once gave notice of it. It appeared that the plaintiff had reason to know the full value of the property. Specific performance was refused, but without costs. The case is explained by James L.J. as one "where a person snapped at an offer which he must have perfectly well known to be made by mistake."⁶⁹

But sometimes, even when the thing which is the subject-matter of an agreement is specifically ascertained, the agreement may be

⁶⁴ *Levy v. Green* (1857) 8 E. & B. 575 ; 112 R. R. 699 ; in Ex. Ch. 1 E. & E. 969 ; 27 L. J. Q. B. 111 ; 28 *ib.* 319 ; per Byles J. 1 E. & E. at 976 ; and cp. *Hart v. Mills* (1846) 15 M. & W. 85 ; 15 L. J. Ex. 200 ; 71 R. R. 578, where a new contract was implied as to part of the goods which was retained ; but in that case the quality as well as the quantity of the goods sent was not in conformity with the order.

⁶⁵ D. 19. 2. locati, 52. Si decem tibi locem fundum, tu autem existimes quinque te conducere, nihil agitur. Sed et si ego minoris me locare sensero, tu pluris te conducere, utique non pluris erit conductio quam quanti ego putavi.

⁶⁶ *Tamplin v. James* (1880) 15 Ch. Div. 215, 217 (Baggallay L.J.). [*Hartog v. Colin & Shields* [1939] 3 All E. R. 566].

⁶⁷ *McKenzie v. Hesketh* (1877) 7 Ch. D. 675 ; 47 L. J. Ch. 231.

⁶⁸ (1861) 30 Beav. 62 ; 132 R. R. 185.

⁶⁹ *Tamplin v. James* (1880) 15 Ch. D. at 221.

avoided by material error as to some attribute of the thing. For some attribute which the thing in truth has not may be a material part of the description by which the thing was contracted for. If this is so, the thing as it really is, namely without the quality, is not that to which the common intention of the parties was directed, and the agreement is void.

An error of this kind will not suffice to make the transaction void unless—

(1) It is such that according to the ordinary course of dealing and use of language the difference made by the absence of the quality wrongly supposed to exist amounts to a difference in kind;⁷⁰

(2) and the error is also common to both parties.

Thus we read "*Mensam argento coopertam mihi ignorantī pro solida vendidisti imprudens; nulla est emptio, pecuniaque eo nomine data condicetur.*"⁷¹ Again, "*Si aēs pro auro veneat, non valet.*"⁷² This, however, is not to be taken too largely. What does *pro auro*, as and for gold, imply as here used? It implies that the buyer thinks he is buying, and the seller that he is selling, a golden vessel: and further, that the object present to the minds of both parties as that in which they are trafficking—the object of their common intention—is not merely this specific vessel, but this specific vessel, being golden. Then, and not otherwise the sale is void.

If the seller fraudulently represents the vessel as golden, knowingly that it is not, the sale is (as between them) not void but voidable at the option of the buyer. For if both parties have been in innocent and equal error it would be unjust to let either gain any advantage: but a party who has been guilty of fraud has no right to complain of having been taken at his word: and it is conceivable that it might be for the interest of the buyer to affirm the transaction, as if the vessel supposed by the fraudulent seller to be of worthless base metal should turn out to be a precious antique bronze. Probably the results are the same if the buyer's belief is founded even on an innocent representation made by the seller. This seems to be assumed by the language of the Court in *Kennedy v. Panama, &c. Mail Company*.⁷³ We shall recur to this point presently. Or in an ordinary case the buyer may choose to treat the seller's affirmation as a warranty, and so keep the thing and recover the difference in value.

Again, if the sale of the specific vessel is made in good faith with a warranty of its quality, the vendor must compensate the purchaser for breach of the warranty, but the sale is not even voidable. For the existence of a separate warranty shows that the

⁷⁰ Savigny, Syst. § 137 (3. 283).

⁷¹ D. 18. 1. de cont. empt. 41, s. 1.

⁷² D. cod. tit. 14, cited and adopted by the Court of Q. B. in *Kennedy v. Panama, &c. Mail Co.*, p. 384. ⁷³ (1867) L. R. 2 Q. B. 580, 587; 36 L. J. Q. B. 260, p. 384.

matter of the warranty is not a condition or essential part of the contract, but the intention of the parties was to transfer the property in the specific chattel at all events. Whether a particular affirmation as to the quality of a specific thing sold be only a warranty or the sale be "conditional, and to be null if the affirmation is incorrect," is a question of fact to be determined by the circumstances of each case.⁷⁴

Accordingly, when the law is stated to be that "a party is not bound to accept and pay for chattels, unless they are really such as the vendor professed to sell, and the vendee intended to buy,"⁷⁵ the condition is not alternative but strictly conjunctive. A sale is not void merely because the vendor professed to sell, or the vendee intended to buy, something of a different kind. It must be shown that the object was in fact neither such as the vendor professed to sell nor such as the vendee intended to buy.

And so in the case supposed the sale will not be invalidated by the mistake of the buyer alone, if he thinks he is buying gold; not even if the seller believes him to think so, and does nothing to remove the mistake, provided his conduct does not go beyond passive acquiescence in the self-deception of the buyer. In a case⁷⁶ where the defendant bought a parcel of oats by sample, believing them to be old oats, and sought to reject them when he found they were new oats, it was held that "a belief on the part of the plaintiff that the defendant was making a contract to buy the oats of which he offered him a sample under a mistaken belief that they were old would not relieve the defendant from liability unless his mistaken belief was induced by some misrepresentation of the plaintiff or concealment by him of a fact which it became his duty to communicate. In order to relieve the defendant it was necessary that the jury should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff,

⁷⁴ See per Wightman J. *Gurney v. Womersley* (1854) 4 E. & B. 133, 142; 24 L. J. Q. B. 46, 99 R. R. 390, 397; *Bannerman v. White* (1861) 10 C. B. N. S. 844; 31 L. J. C. P. 28, p. 221; *Azemar v. Casella* (1867) L. R. 2 C. P. 431, 677; 36 L. J. C. P. 124. The Roman law is the same as to a sale with warranty: D. 19. 1 de act. empt. 21 § 2; expld. by Savigny, Syst. 3. 287; and the whole of Savigny's admirable exposition of so-called *error in substantia* in §§ 137, 138 (3. 276 sqq.). Of course the conclusions in detail are not always the same as in our law; and the fundamental difference in the rules as to the actual transfer of property in goods sold (as to which, see Blackburn on the Contracts of Sale, Part 2, Ch. 3) must not be overlooked. But this does not affect the usefulness and importance of the general analogies.

⁷⁵ Per Cur. *Hall v. Conder* (1857) 2 C. B. N. S. 22, 41; 26 L. J. C. P. 138, 143; 109 R. R. 590, 600.

⁷⁶ *Smith v. Hughes* (1871) L. R. 6 Q. B. 597; 40 L. J. Q. B. 221; per Cockburn C. J. L. R. 6 Q. B. 603; per Hannen J. 610. The somewhat refined distinction here taken does not seem to exist in Roman law: D. 19. 1. de act. empt. 11 § 5; Savigny, 3. 293, according to whom it makes no difference whether there be on the part of the vendor ignorance, passive knowledge, or even actual fraud; the sale being wholly void in any case. [It has been questioned whether *Smith v. Hughes* ought not to be classified under facts operating on the performance of a contract rather than under mistake affecting formation of the contract; 14 Canadian Bar Review (1936), 784. Williston, Contracts, § 1497, and Restatement of Contracts, § 472, however, appear to coincide with Pollock's classification of the case.]

was contracting to sell old oats.”” “There is no legal obligation on the vendor to inform the purchaser that he is under a mistake not induced by the act of the vendor””; and therefore the question is whether we have to do merely with a motive operating on the buyer to induce him to buy, or with one of the essential conditions of the contract.” “Videamus, quid inter ementem et vendentem actum sit”⁷⁷: “the intention of the parties governs in the making and in the construction of all contracts”⁷⁸; this is the fundamental rule by which all questions, even the most refined, on the existence and nature of a contract must at last come to be decided.

Another curious case of this class is *Cox v. Prentice*.⁷⁹ The declaration contained a count in assumpsit as on a warranty, and the common money counts. The nature of the material facts will sufficiently appear by the following extract from the judgment of Bayley J.:—

“What did the plaintiffs bargain to buy and the defendants to sell? They both understand [*sic*] that the one agreed to buy and the other to sell a bar containing such a quantity of silver as should appear by the assay, and the quantity is fixed by the assay and paid for; but through some mistake in the assay the bar turns out not to contain the quantity represented but a smaller quantity. The plaintiff therefore may rescind the contract and bring money had and received, having offered to return the bar of silver.”

And by Dampier J.:—“The bargain was for a bar of silver of the quality ascertained by the assay-master, and it is not of that quality. It is a case of mutual error.” These judgments went farther than was necessary to the decision,⁸⁰ for a verdict had been taken only for the difference in value. It would seem that the sale was good, and the mistake affected only the fixing of the price; the contract being to pay for the real quantity of silver, not for the quantity found by a particular assay.

It is important to distinguish from the cases above considered another class where persons who have contracted for the purchase of real property or interests therein have been held entitled at law⁸¹ as well as in equity⁸² to rescind the contract on the ground of a misdescription of the thing sold in some particular materially

⁷⁷ Per Hannen J. L. R. 6 Q. B. at 610—611.

⁷⁸ Per Blackburn J. L. R. 6 Q. B. at 607.

⁷⁹ *Ib.* per Cockburn C.J.

⁸⁰ Julianus in D. 18. 1. de cont. empt. 41 pr.

⁸¹ Per Cur. *Bannerman v. White* (1861) 10 C. B. N. S. 844, 860; 31 L. J. C. P. 28, 32.

⁸² (1815) 3 M. & S. 344; 16 R. R. 288.

⁸³ And certainly farther than the civil law: see D. 18. 1. de cont. empt. 14, where though a bracelet “*quae aurea dicebatur*” should be found “*magna ex parte aenea*,” yet “*venditionem esse constat ideo, quia auri aliquid habuit*.”

⁸⁴ *Flight v. Booth* (1834) 1 Bing. N. C. 370; 41 R. R. 599; *Phillips v. Caldwell* (1868) L. R. 4 Q. B. 159; 38 L. J. Q. 68.

⁸⁵ *Stanton v. Tattersall* (1853) 1 Sm. & G. 529; *Earl of Durham v. Legard* (1863) 34 Beav. 611; 34 L. J. Ch. 589; *Torrance v. Bolton* (1872) L. R. 8 Ch. 118; 42 L. J. Ch. 177. The details of the subject belong to the law of Vendors and Purchasers.

affecting the title, quantity, or enjoyment of the estate. In some of these cases language is used which, taken alone, might lead one to suppose the agreement absolutely void; and in one or two (e.g., *Torrance v. Bolton*) there is some real difficulty in drawing the line. But they properly belong to the head of Misrepresentation, or else (which may be the sounder view where applicable)⁸⁸ are cases where the contract is rather broken than dissolved. A man is not bound to take a house or land not corresponding to the description by which he bought it any more than he is bound to accept goods of a different denomination from what he ordered, or of a different quality from the sample. Mistake or no mistake, the vendor has failed to perform his contract. The purchaser may say: "You offered to sell me a freehold: that means an unincumbered freehold, and I am not bound to take a title subject to covenants":⁸⁹ or "You offered to sell an absolute reversion in fee simple: I am not to be put off with an equity of redemption and two or three Chancery suits."⁹⁰ I rescind the contract and claim back my deposit." Cases of this kind, therefore, are put aside for the present.

NON-EXISTENT SUBJECT-MATTER⁸⁹

Again, an agreement is void (or better, perhaps, fails to become a contract) if it relates to a subject-matter (whether a material subject of ownership or a particular title or right) contemplated by the parties as existing but which in fact does not exist. Herein, as before, everything depends on the intention of the parties, and the question is whether the existence of the thing contracted for or the state of things contemplated was or was not presupposed as essential to the agreement.⁹¹ Such is presumed to be the understanding in the case of sale.⁹² We may conveniently use the illustrations given on this point in the Indian Contract Act.⁹³

a A. agrees to sell to B. a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts. The agreement is void.

⁸⁸ The difference is purely theoretical; for if it be an actual breach of contract the purchaser can recover only nominal damages: *Bain v. Fothergill* (1873-4) L. R. 7 H. L. 158; 43 L. J. Ex. 243, confirming *Flureau v. Thornhill* (1776) 2 W. Bl. 1078. The analogy suggested in the text should perhaps be confined to cases where the misdescription goes to matter of title. One cannot compare a specific sale of land to a non-specific sale of goods: but the contract is not merely to sell specific land, but to give a certain kind of title.

⁸⁹ *Phillips v. Caldleugh* (1868) L. R. 4 Q. B. 159; 38 L. J. Q. B. 68.

⁹⁰ *Torrance v. Bolton* (1872) L. R. 8 Ch. 118; see at 124.

⁹¹ [See F. H. Lawson in 52 L. Q. R. (1936) 79-105, "Error in substantia."]

⁹² This statement was approved by Lawrence L. J. in *Lever Bros., Ltd. v. Bell* [1931] 1 K. B. at 590. The reversal of the decision by the House of Lords will be considered later: it does not appear to affect the value of this dictum.

⁹³ Since 1893 the common law is declared in England by the Sale of Goods Act, 1893 (56 and 57 Vict. c. 71), ss. 6, 7.

⁹⁴ S. 20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

This was assumed in the House of Lords and by the judges in *Couturier v. Hastie*,¹³ where the only question in dispute was on the effect of the special terms of the contract.¹⁴

b. A. agrees to buy from B. a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.¹⁵

We may add a like example from the Digest. A. agrees with B. to buy a house belonging to B. The house has been burnt down, but neither A. nor B. knows it. Here there is not a contract for the sale of the land on which the house stood, with compensation or otherwise, but the sale is void¹⁶

In like manner a sale of shares in a company will not be enforced if at the date of the sale a petition for winding-up has been presented of which neither the vendor nor the purchaser knew.¹⁷ But the ignorance of the buyer only in similar circumstances does not of itself invalidate the sale. It seems however that the sale would be voidable on the ground of fraud if the seller knew of the buyer's ignorance, but that such knowledge should be distinctly and completely alleged.¹⁸ An agreement to take new shares in a company which the company has no power to issue is also void, and money paid under it can be recovered back.¹⁹

c. A. being entitled to an estate for the life of B. agrees to sell it to C. B. was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

This is in substance the case of *Strickland v. Turner*,¹ where the subject of the sale was a life annuity.

For the general principle there is ample authority. In *Hitchcock v. Giddings*² a remainderman in fee expectant on an estate tail had sold his interest, a recovery having been already suffered unknown to the parties; a bond given to secure the purchase money was set aside. "Here is an estate which if no recovery had been suffered was a good one. Both parties, being equally ignorant that a recovery had been suffered, agree for the sale and purchase

¹³ (1856) 5 H. L. C. 673 ; 25 L. J. Ex. 253 ; 101 R. R. 329. For a fuller account of the case, see p. 241.

¹⁴ S. 6 of the Sale of Goods Act applies to a partial loss : *Barrow, Lane and Ballard, Ltd. v. Philip Phillips & Co., Ltd.* [1929] 1 K. B. 574 ; 98 L. J. K. B. 193.

¹⁵ Pothier, *Contrat de Vente*, § 4, cited 5 H. L. C. 578, says : " Si donc, ignorant que mon cheval est mort, je le vends à quelqu'un, il n'y aura pas un contrat de vente, faute d'une chose qui en soit l'objet." Cp. Code Civ. 1601. " Si au moment de la vente la chose vendue était périmée en totalité, la vente serait nulle " ; and so Italian Code, 1461.

¹⁶ Paulus in D. 18. 1. de cont. empt. 57, pr. Domum emi, cum eam et ego et venditor combustam ignoraremus ; Nerva, Sabinus, Cassius, nihil venisse, quamvis area maneat, pecuniamque solutam condici posse aiunt. Cp. Papinian, eod. tit. 58. Arboribus quoque vento dejectis vel absumptis igne dictum est emptionem fundi non videri esse contractam, si contemplatione illarum arborum, veluti oliveti, fundus comparabatur, sive sciente sive ignorante venditore.

¹⁷ *Emmerson's case* (1866) L. R. 1 Ch. 433, expld. L. R. 3 Ch. 391, per Wood L. J.

¹⁸ *Rudge v. Bowman* (1868) L. R. 3 Q. B. 689, 697. The Roman lawyers seem to have treated the presumption of *dolus* as absolute if the seller knew the facts. See the continuation of the passages above cited.

¹⁹ *Bank of Hindustan v. Alison* (1870) L. R. 6 C. P. 54, in Ex. Ch. *ib.* 222 ; 40 L. J. C. P. 1, 117 ; *Ex parte Alison* (1874) L. R. 15 Eq. 394 ; 9 Ch. 1, 24 ; *Ex parte Campbell* (1873) L. R. 16 Eq. 417 ; L. R. 9 Ch. 1, 12 ; 42 L. J. Ch. 771.

¹ (1852) 7 Ex. 208 ; 22 L. J. Ex. 115 ; 86 R. R. 619. The only question in dispute was when the vendor's interest was intended to cease. Cp. *Kennedy v. Thomasson* [1929] 1 Ch. 426 ; 98 L. J. Ch. 98, where the Court was of opinion that there was in fact no concluded agreement.

² (1817) 4 Pri. (Ex. in Eq.) 135, and better in Dan. 1, 18 R. R. 725.

of the estate, and the purchaser is content to abide the risk of a recovery being subsequently suffered. He conceives, however, he is purchasing something, that he is purchasing a vested interest. He is not aware that such interest has already been defeated . . . [The defendant] has sold that which he had not—and shall the plaintiff be compelled to pay for that which the defendant had not to give?"³ More recently, in *Cochrane v. Willis*,⁴ an agreement had been made between a remainderman and the assignee of a tenant for life of a settled estate, founded on the assignee's supposed right to cut the timber. The tenant for life was in fact dead at the date of the agreement. The Court refused to enforce it, as having been entered into on the supposition that the tenant for life was alive, and intended to take effect only on that assumption. So a life insurance cannot be revived by the payment of a premium within the time allowed for that purpose by the original contract, but after the life has dropped unknown to both insurers and assured, although it was in existence when the premium became due, and although the insurers have waived proof of the party's health which by the terms of renewal they might have required: the waiver applies to the proof of health of a man assumed to be alive, not to the fact of his being alive.⁵ An agreement to sell a policy on the life of a person supposed to be living, who is in fact dead, is not binding, and the subsequent execution of an assignment in pursuance of the agreement, the fact being still unknown to the vendor, makes no difference.⁶

The old case of *Bingham v. Bingham*,⁷ which was relied on in *Cochrane v. Willis*, belongs to this class. As in *Cochrane v. Willis*, the substance of the facts was that a purchaser was dealing with his own property, not knowing that it was his. There is therefore no ground for criticizing the decision as having given relief against a mere mistake of law.⁸ It does not rest on mistake as a ground of special relief at all, but on total failure of the supposed subject-matter of the transaction. The one party could not buy what was his own already, nor could the other (in the words of the judgment as reported) be allowed "to run away with the money in consideration of the sale of an estate to which he had no right." So we find it treated in the Roman law quite apart from any question

³ Dan. at 7; 18 R. R. 729.

⁴ (1865) L. R. 1 Ch. 58; 35 I. J. Ch. 36; 145 R. R. 548.

⁵ *Pritchard v. Merchant's Life Assurance Society* (1858) 3 C. B. N. S. 622; 27 L. J. C. P. 169; 111 R. R. 777. For the somewhat different treatment of the contract of marine insurance, where at the date of effecting the policy the risk has been determined without the knowledge of the parties, see *Bradford v. Symondson* (1881) 7 Q. B. Div. 456; 50 L. J. Q. B. 582.

⁶ *Scott v. Coulson* [1903] 2 Ch. 249; 72 L. J. Ch. 600, C. A.

⁷ (1748) 1 Ves. Sr. 126; Belt's Supp. 79.

⁸ Story, Eq. Jurisp. § 124, took this objection.

⁹ The case is considered, among other authorities and upheld on the true ground, in *Stewart v. Stewart* (1849) 6 Cl. & F. at 968; cp. the remarks of Hall V.-C. in *Jones v. Clifford* (1876) 3 Ch. D. 779, 790; 45 L. J. Ch. 809, and of Lindley L.J. in *Huddersfield Banking Co. v. H. Lister & Son, Ltd.* [1858] 2 Ch. 273, 281.

of mistake except as to the right of recovering back money paid under the agreement. A stipulation to purchase one's own property is "naturali ratione inutilis" as much as if the thing was destroyed, or not capable of being private property.¹⁰ Such an agreement is naught without reference to the belief or motive which determined it.

Lord Westbury gave the correct rule in a case exactly similar in principle. In *Cooper v. Phibbs*¹¹ A. agreed to take a lease of a fishery from B., on the assumption that A. had no estate and B. was tenant in fee. Both parties were mistaken at the time as to the effect of a previous settlement; and in truth A. was tenant for life and B. had no estate at all. It was held that this agreement was invalid. Lord Westbury stated the ground of the decision as follows:—"The result, therefore, is that at the time of the agreement for the lease which it is the object of this petition¹² to set aside, the parties dealt with one another under a mutual mistake as to their respective rights. The petitioner did not suppose that he was, what in truth he was, tenant for life of the fishery. The other parties acted upon the impression given to them by their father that he (their father) was the owner of the fishery, and that the fishery had descended to them. In such a state of things there can be no doubt of the rule of the court of equity with regard to the dealing with that agreement. It is said '*Ignorantia iuris haud excusat*'; but in that maxim the word '*ius*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*ius*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties—the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand."¹³

The effect of *Cooper v. Phibbs*, though not the authority of the general principle, appears to be to some extent cut down by the decision of the House of Lords in *Bell v. Lever Bros., Ltd.*,¹⁴ reversing by a majority of three to two the unanimous decision of the Court of Appeal,¹⁵ which confirmed the judgment in first

¹⁰ Gaius in D. 44. 7. de obl. et act. 1 § 10. *Suae rei emptio non valet, sive sciens, sive ignorans emi*; sed si ignorans emi, quod solvero repetere potero, quia nulla obligatio fuit: Pomponius, D. 18. 1. de cont. empt. 16 pr.

¹¹ (1867) L. R. 2 H. L. 149.

¹² A Cause Petition in the Irish Court of Chancery. ¹³ L. R. 2 H. L. 170.

¹⁴ [1932] A. C. 161; 101 L. J. K. B. 129. [It is submitted that the House of Lords in this case, in no way impugned the validity of Lord Westbury's dictum in *Cooper v. Phibbs*; see the dictum in *Norwich Union Fire Insurance Society, Ltd. v. Price, Ltd.* [1934] A. C. 462-463; and 59 L. Q. R. 338-339.]

¹⁵ [1931] 1 K. B. 557; 100 L. J. K. B. 78.

instance of Wright J., now Lord Wright. One of the majority in the House relied on a point of pleading of no general importance. The facts were peculiar, and the case was complicated in its earlier stages, as too often happens, by charges of fraud which the evidence failed to justify. The following statement of the material facts on which the decision finally turned is taken from a very able critical note in the *Law Quarterly Review*,¹⁶ For simplicity's sake only one defendant is mentioned; in fact there were two, but their cases were treated as identical in point of law.

"A. and B. enter into an agreement by which A. is to serve B. for a certain period. Whilst the agreement is in being A. is guilty of a breach of duty which would entitle B. to dismiss him summarily, though B. is unaware of this. Subsequently B. finds that it is no longer possible, owing to certain changes in the circumstances, to continue to employ A. Negotiations are, therefore, entered upon for a rescission of the contract of service, neither party having it in mind that B. could, if he knew the true facts, dismiss A. there and then. It is ultimately agreed that A. shall release B. from any further liability to employ him, in consideration of the receipt of a large sum of money by way of compensation. Some time thereafter B. discovers the existence of A.'s misconduct. Can he repudiate the compensation agreement and claim a refund of the money paid under it, on the ground that the agreement was entered into under a mutual mistake as to a fact assumed as the basis of the agreement, *i.e.*, that there was a contract of service which could only be determined by the employer with the consent of the servant?"

A.'s employment, it may be added, was not of an ordinary kind. It was the specially confidential business of being the chairman of a company in which B. held a controlling interest. Making private profit for which he ought to have accounted to that company was clearly a breach of duty as against both the controlled and the controlling company. Wright J. however did not rely on this. After reviewing the authorities he held that the supposed fact of A. having a good claim to compensation was an essential condition of B.'s agreement to pay him, the jury having found that B. would have agreed to no such thing, but on the contrary dismissed A. if A.'s breach of duty had been known. Then, taking it as a fact that this matter was not present to A.'s mind at all when the agreement to compensate him was made and performed,¹⁷ he held that A. and B. entered into the agreement for compensation under a common mistake—namely the assumption that A. was entitled to be compensated—so essential that there was no binding contract. The Court of Appeal (Scrutton, Lawrence and Greer L.JJ.) agreed

¹⁶ 48 L. Q. R. 148, signed H. C. G.

¹⁷ It was, of course, not arguable, since the decision of the House of Lords in *Derry v. Peek* (1889) 14 App. Ca. 937; 57 L. J. Ch. 947, that a man shall have no advantage from forgetting that which he ought to have remembered.

with Wright J. and also thought the plaintiff company entitled to succeed on the defendants' breach of duty in concealing their private profits. In the House of Lords, Lord Blanesburgh differed with the Court of Appeal upon an elaborate review of the facts and proceedings, mainly on the ground that the question of common mistake had not been raised in due time (which the dissentients, with the Court of Appeal, treated as a minor matter of procedure) but also agreed with Lord Atkin, whose opinion was the really decisive one. The reasons given in that opinion for refusing to disallow the plaintiff company's agreement to compensate the defendants cannot easily be summarized, but they seem to involve the position that common mistake of the parties as to the subject-matter of an intended contract will not prevent the formation of a binding contract unless it goes to the very existence or identity of the supposed subject, as where I offer to buy property which is already mine, or a ship which is no longer afloat. Parties, again, may make the existence of any state of things a condition of their agreement: but such a condition will not, according to Lord Atkin, be implied where it does not go to the very root of the matter—in common-law phrase, to the whole of the consideration. Lord Thankerton, to the same effect, relied much on the decision, now classical, in *Kennedy v. Panama, &c., Co.*¹⁸ But in this case, it is submitted, the plaintiff company surely did not get anything like what it bargained for. The release of an imaginary claim to compensation—not disputed or regarded as disputable but assumed without question to be good—is surely of no value in law. The view suggested in the last sentence is in agreement with that of Lord Warrington of Clyffe, in which Lord Hailsham concurred. It is further submitted that the criterion propounded by Lord Atkin cannot be consistently applied without the aid of fine-drawn distinctions of a kind not desirable in matters of business.

The peculiarities of this case have made a rather full summary of its course necessary. There is obviously no doubt that whatever it does lay down as a general rule must bind all English courts: but the learned reader will judge for himself exactly what that is, and what is the persuasive authority of the reasons that prevailed in the House of Lords. For my part I agree with the learned critic whom I have already cited that *Bell v. Lever Bros., Ltd.*, cannot be regarded as a satisfactory case; and I will even venture to hope that in the next generation our successors will put it on the shelf as one of those decisions on peculiar facts in which it is unsafe to put one's trust as settling any general principle.¹⁹

¹⁸ P. 384.

¹⁹ [The case is also discussed by Mr. Landon in 51 L. Q. R. (1935) 650; Mr. Tylor in 52 L. Q. R. (1936) 27; Mr. Hansom in 53 L. Q. R. (1937) 118; and by Mr. Lawson (incidentally) in 52 L. Q. R. (1936) 79—105. My own humble submission is that Lord Atkin's statement of principle as to innocent misapprehension, [1932]

In any case there are many decisions of the same class as *Cooper v. Phibbs*²⁰ where authority does not appear to be affected by anything laid down in *Bell v. Lever Bros.*²¹ In *Broughton v. Hutt*,²² the heir-at-law of a shareholder in a company joined with several other shareholders in giving a deed of indemnity to the directors, believing that the shares had descended to him as real estate, whereas they were personal estate. The deed was held to be void as against him in equity at all events, and probably at law. "The plaintiff never intended to be bound unless he was a shareholder, and the defendants never intended him to be bound unless he was so." Here the mistake was plainly one of fact within Lord Westbury's definition, namely as to the character of the shares by the constitution of the particular company. It is submitted, however, that an erroneous fundamental assumption made by both parties even as to the general rule of law might well prevent any valid agreement from being formed.

In the same way an agreement to assign a lease for lives would be inoperative if all the lives had dropped unknown to the parties. But the only thing which the parties can here be supposed, in the absence of expressed condition or warranty, to assume as essential is that the lease is subsisting, that is, that at least one of the lives is, not that they all are, still in existence. Where the assignor of a lease for the lives of A., B., and C., expressly covenanted with the assignee that the lease was a subsisting lease for the lives of A., B., and C., and the survivors and survivor of them, this was held to be only a covenant that the lease was subsisting, and not that all the lives were in being at the date of the assignment.²³ That is, his contract was interpreted, according to the general practice and understanding of conveyancers, as a contract to transfer an existing lease for three lives, not necessarily a lease for three lives all existing.

If in any state of things otherwise resembling those just now discussed we find, instead of ignorance of the material fact on both sides, ignorance on the one side and knowledge on the other, then the matter has to be treated differently. Suppose A. and B. are the contracting parties; and let us denote by X. a fact or state of facts materially connected with the subject-matter of the contract, which is supposed by A. to exist, but which in truth does not exist, and is known by B. not to exist. Then we have to ask these questions:—

1. Does A. intend to contract only on the supposition that X.

A. C. at 220, is correct, whatever opinions of it may be held of its application to the facts of the case. Lord Wright has said of it extrajudicially (*Legal Essays*, 214): "I think the decision turned on what in all such cases is the real problem, Whether the mistake was sufficiently basic."

²⁰ P. 397.

²¹ Pp. 1.

²²

& J. 501.

(1871) L. R. 6 Q. B. 469, in Ex. Ch. 7 Q. B. 144; 41 L. J. Q. B. 90

exists? which may be put in another way thus: If A.'s attention were called to the possibility of his belief in the existence of X. being erroneous, would he require the contract to be made conditional on the existence of X.?

a. If so—Does B. know that A. supposes X. to exist?

g. If B. knows this—Does he also know that A. intends to contract only on that supposition?

If the answer to any one of these questions is in the negative, it seems there is a binding contract.²⁴ But it is to be observed that a negative answer to the second question will generally require strong evidence to establish it, and that if this question be answered in the affirmative, an affirmative answer to the third question will often follow by an almost irresistible inference. Thus if a purchaser of a reversionary interest subject to prior life interests knows that one of these has ceased, and nothing is said about it at the time of the contract, then the purchaser can hardly expect anybody to believe either that he himself overlooked the material importance of the fact, or that he was not aware of the vendor's ignorance of it, or that he supposed that the vendor would not treat it as material.²⁵ So in the case already cited²⁶ of the sale of shares after a petition for the winding up of the company had been presented, a distinct allegation in the pleadings that the seller knew of the buyer's ignorance of that fact, would, it seems, have been sufficient to constitute a charge of fraud.

If the questions above stated be all answered in the affirmative, either by positive proof or by probable and uncontradicted presumption from the circumstances, then it may be considered either that the case becomes one of fraud, or at least that the party who knew the true state of the facts, and also knew the other party's intention to contract only with reference to a supposed different state of facts, is precluded from denying that he understood the contract in the same sense as that other, namely as conditional on the existence of the supposed state of facts.²⁷

On a similar principle (as we have already mentioned incidentally) it is certain that where fundamental error of one party is caused by a fraudulent misrepresentation, and probable that where it is caused by an innocent misrepresentation on the part of the other, that other is estopped from denying the validity of the transaction if the party who has been misled thinks fit to affirm it.

Does it follow that the contract is in its inception not void, but voidable at the option of the party misled? Not so: for the fraud or negligence of the other must not put him in any worse

²⁴ *Smith v. Hughes* (1871) L. R. 6 Q. B. 597, p. 392.

²⁵ See *Turner v. Harvey* (1821) Jac. 169; 23 R. R. 15.

²⁶ *Rudge v. Bowman* (1868) L. R. 3 Q. B. 689; 37 L. J. Q. B. 193.

²⁷ *Cp. Whiteley v. Delaney* [1914] A. C. 132; 83 L. J. Ch. 349, a very peculiar case where a common mistake was due to a third person's fault.

position as regards third persons. These, if the transaction be simply voidable, are entitled to treat it as valid until rescinded, and may acquire indefeasible rights under it; if it be void they can acquire none, however blameless their own part in the matter may be.²⁸ Thus there is a real difference between a contract voidable at the option of one party and a void agreement whose nullity the other is estopped as against him from asserting. In the case of contracts to take shares in companies an anomaly is admitted, as we have seen, for reasons of special necessity, and the contract is treated as at most voidable. But even here there must be an original *animus contrahendi* to this extent, that the shareholder was minded to have shares in some company. An application for shares signed in absolute ignorance of its true nature and contents, like the bill in *Foster v. Mackinnon*,²⁹ could not be the foundation of a binding contract to take shares. An allotment in answer to such an application would be a mere proposal, and whether it were accepted or not would have to be determined by the ordinary rules of law in that behalf (see Ch. I).

It appears from the authorities which have been adduced that a party to an apparent agreement which is void by reason of fundamental error has more than one course open to him.

He may wait until the other party seeks to enforce the alleged agreement and then assert the nullity of the transaction by way of defence. If he thinks fit he may also take the opportunity of seeking by counterclaim to have the instrument sued on set aside.³⁰

Or he may right himself, if he prefers it, by coming forward actively as plaintiff. When he has actually paid money as in performance of a supposed valid agreement, and in ignorance of the facts which exclude the reality of such agreement, he may recover back his money as having been paid without any consideration (the action "for money received" of the old practice). He paid on the supposition that he was discharging an obligation, whereas there was in truth no obligation to be discharged.

Moreover he may sue in the Chancery Division,³⁰ whether anything has been done under the supposed agreement or not, to have the transaction declared void and to be relieved from any possible claims in respect thereof.

On the other hand, although he is entitled to treat the supposed agreement as void, and is not as a rule prejudiced by anything he may have done in ignorance of the true state of the facts, yet after that state of facts has come to his knowledge he may

²⁸ *Foster v. Mackinnon* (1869) L. R. 4 C. P. 704; 38 L. J. C. P. 310, p. 374.

²⁹ (1869) L. R. 4 C. P. 704; 38 L. J. C. P. 310, p. 374.

³⁰ *Storey v. Waddle* (1879) 4 Q. B. Div. 289, seems to overrule virtually the doctrine assumed in *Mostyn v. West Mostyn Coal and Iron Co.* (1876) 1 C. P. D. 145; 45 L. J. C. P. 401, that it is needful for this purpose to obtain a transfer of the action to the Chancery Division.

³¹ Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. 5, c. 49), s. 56, re-enacting s. 34 of the Judicature Act, 1873 (36 and 37 Vict. c. 66).

nevertheless elect to treat the agreement as subsisting: or as it would be more correct to say, he may carry into execution by the light of correct knowledge the former intention which was frustrated by want of the elements necessary to the formation of any valid agreement. It is not that he confirms the original transaction (except in a case where there is also misrepresentation, see p. 401), for there is nothing to confirm, but he enters into a new one.

It might be thought to follow that in cases within the Statute of Frauds or any other statute requiring certain forms to be observed, we must look not to the original void and improperly so-called agreement, but to the subsequent election or confirmation in which the only real agreement is to be found, to see if the requirements of the statute have been complied with. No express authority has been met with on this point. But analogy is in favour of a deliberate adoption of the form already observed being held sufficient for the purpose of the new contract.³¹

A note on Bracton's treatment on the subject of fundamental error will be found in the Appendix.³²

PART III—MISTAKE IN EXPRESSING TRUE CONSENT

This occurs when persons desiring to express an intention which when expressed carries with it legal consequences have by mistake used terms which do not accurately represent their real intention. As a rule it can occur only when the intention is expressed in writing. It is possible to imagine similar difficulties arising on oral contracts, as for example if the discourse were carried on in a language imperfectly understood by one or both of the speakers. But we are not aware that anything of this kind has been the subject of judicial decision.³³ The general result of persons talking at cross purposes is that there is no real agreement at all. This class of cases has already been dealt with. We are now concerned with those where there does exist a real agreement between the parties, only wrongly expressed. Such mistakes as we are now about to consider were not wholly disregarded at common law; but they are fully and adequately dealt with only by the jurisdiction which was formerly peculiar to courts of equity. We shall see that this jurisdiction is exercised with much caution and within carefully defined limits.

On the whole the cases of mistake in expressing intention fall into three classes:—

1. Those which are sufficiently remedied by the general rules of construction.

³¹ *Stewart v. Eddowes* (1874) L. R. 9 C. P. 311; 43 L. J. C. P. 204, p. 128.

³² Appendix 7. This passage is not included in the portions edited by Maitland in "Bracton and Azo."

³³ See however *Phillips v. Bistoli* (1824) 2 B. & C. 511; 26 R. R. 433, which comes near the supposed case.

2. Those which are remedied by special rules of construction derived from the practice of courts of equity.

3. Those which require peculiar remedies administered by the Court in its equitable jurisdiction.

We proceed to take the classes of cases above mentioned in order.

1—GENERAL RULES

We have already seen that the more obvious forms of mistaken expression, mechanical errors as we may call them, can be dealt with in the ordinary course of interpretation.³⁴ A few more authorities may now be added.

In a case in the House of Lords the rule was laid down and acted upon that "both courts of law and of equity may correct an obvious mistake on the face of an instrument without the slightest difficulty."³⁵ Here a draft agreement for a separation deed had by mistake been copied so as to contain a stipulation that the husband should be indemnified against his own debts: but it was held that the context and the nature of the transaction clearly showed that the wife's debts were meant, and that in framing the deed to be executed under the direction of the Court in pursuance of the agreement the mistake must be corrected accordingly. So the Court may presume from the mere inspection of a settlement that words which, though they make sense, give a result which is unreasonable and repugnant to the general intention and to the usual frame of such instruments, were inserted by mistake.³⁶

An agreement has even been set aside chiefly, if not entirely, on the ground that the unreasonable character of it was enough to satisfy the Court that neither party could have understood its true effect: such at least appears to be the meaning of Lord Eldon's phrase, "a surprise on both parties."³⁷ The agreement itself purported to bind the tenant of a leasehold renewable at arbitrary (and in fact always increasing) fines at intervals of seven years to grant an underlease at a fixed rent with a perpetual right of renewal. The lessor was in his last sickness, and there was evidence that he was not fit to attend to business. Charges of fraud were made, as usual in such cases, but not sustained: the decision might, however, have been put on the ground of undue influence, and was so to some extent by Lord Redesdale.

Again, there is legal as well as equitable jurisdiction to restrain the effect of general words both in matter of covenant and in

³⁴ Chap. 6, pp. 201—202.

³⁵ *Wilson v. Wilson* (1854) 5 H. L. C. 40, 66; 101 R. R. 25, 42, per Lord St. Leonards; and see his note, V. & P. 171.

³⁶ *Re De la Touche's settlement* (1870) L. R. 10 Eq. 599, 603; 40 L. J. Ch. 85; where however the mistake was also established by evidence.

³⁷ *Willan v. Willan* (1809-10) 16 Ves. 72, 84; affirmed in Dom. Proc. 2 Dow, 275, 278. But the facts were very peculiar, and the case has not been cited for many years.

matter of conveyance, if it sufficiently appears by the context that they were not intended to convey their apparent unqualified meaning.³⁸ When there is a specific description of a particular kind of property, followed by words which *prima facie* would be sufficient to include other property of the same kind, it has been held that those words do not include the property not specifically described, on the principle *expressio unius est exclusio alterius*.³⁹ But cases of this kind, like those on which the *ejusdem generis* rule or presumption⁴⁰ is founded, fall under normal principles of construction and have nothing to do with any suggestion of mistake.

2.—PECULIAR RULES OF CONSTRUCTION IN EQUITY

Such rules have been introduced by courts of equity in dealing with:

- A. General words.
- B. Stipulations as to time.
- C. Penalties.

A. RESTRICTION OF GENERAL WORDS

We have seen that courts both of law and of equity have assumed a power to put a restricted construction on general words when it appears on the face of the instrument that it cannot have been the real intention of the parties that they should be taken in their apparent general sense.

Courts of equity went farther, and did the like if the same conviction could be arrived at by evidence external to the instrument. Thus general words of conveyance⁴¹ and an unqualified covenant for title,⁴² though not accompanied as in *Browning v. Wright*⁴³ by

³⁸ *Browning v. Wright* (1799) 2 B. & P. 13, 26; 5 R. R. 521; but it was also thought the better construction to take the clause in question as being actually part of a special covenant, and so no general covenant at all: *Hesse v. Stevenson* (1803) 3 B. & P. 565, 574; *Rooke v. Lord Kensington* (1856) 2 K. & J. 753, 771; 25 L. J. Ch. 795; 110 R. R. 456, 468. The same principle applies to general words in the statement of a company's objects in its memorandum of association: *Ashbury, &c. Co. v. Riche* (1875) L. R. 7 H. L. 653; 44 L. J. Ex. 185.

³⁹ *Denn v. Wilford* (1826) 8 Dowl. & Ry. 549. The case was a curious one. A fine had been levied of (*inter alia*) twelve messuages and twenty acres of land in Chelsea. The consor had less than twenty acres of land in Chelsea, but nineteen messuages. It was decided that although all the messuages would have passed under the general description of land if no less number of messuages had been mentioned, yet the mention of twelve messuages prevented any greater number from passing under the description of land; and that parol evidence was admissible to show first that there were in fact nineteen messuages, this being no more than was necessary to explain the nature and character of the property; next (as a consequence of the construction thereupon adopted by the Court) which twelve out of the nineteen messuages were intended. And see further the notes to *Roe v. Trammar* (1758) 2 Sm. L. C. 484 *sqq.* (13th ed.).

⁴⁰ Whatever it really amounts to, see per McCordie J. *Magnhild (S.S.) v. McIntyre* [1920] 3 K. B. 321; 89 L. J. K. B. 1110.

⁴¹ *Thomas v. Davis* (1757) 1 Dick. 301.

⁴² *Coldcut v. Hill* (1662), 1 Ch. Ca. 15, *sed qu.* for the case looks very like admitting contemporaneous conversation to vary the effect of a solemn instrument, and that without any mistake or fraud being made out, which is quite contrary to the modern rule.

⁴³ (1799) 2 B. & P. 13; 5 R. R. 521, note 38, *supra*.

other qualified covenants, have been restrained on proof that they were not meant to extend to the whole of their natural import.

This jurisdiction, in modern times a well established one, is exercised chiefly in dealing with releases. "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given."⁴⁴ This includes the proposition that in equity "a release shall not be construed as applying to something of which the party executing it was ignorant."⁴⁵ There is at least much reason to think that it matters not whether such ignorance was caused by a mistake of fact or of law.⁴⁶

In particular a release executed on the footing of accounts rendered by the other party, and assuming that they are correctly rendered, may be set aside if those accounts are discovered to contain serious errors, and this, in a grave case, even after many years.⁴⁷ It would be otherwise however if the party had examined the accounts himself and acted on his own judgment of their correctness. An important application of this doctrine is in the settlement of partnership affairs between the representatives of a deceased partner (especially when they are continuing partners) and the persons beneficially interested in his estate.⁴⁸

A releasor, however, cannot obtain relief if he has in the meanwhile acted on the arrangement as it stands in such a way that the parties cannot be restored to their former position.⁴⁹

B. STIPULATIONS AS TO TIME

It is a familiar principle that in all cases where it is sought to enforce contracts consisting of reciprocal promises, and "where the plaintiff himself is to do an act to entitle himself to the action, he must either show the act done, or if it be not done, at least that he has performed everything that was in his power to do."⁵⁰

Accordingly, when by the terms of a contract one party is to do something at or before a specified time, and when he fails to do such thing within that time, he could not afterwards claim the performance of the contract if the stipulation as to time were

⁴⁴ Per Lord Westbury, *L. & S. W. Rly. Co. v. Blackmore* (1870) L. R. 4 H. L. at 723; 39 L. J. Ch. 713; cp. *Lindo v. Lindo* (1839) 1 Beav. 496, 506; 49 R. R. 419, 425; *Farwell v. Coker* (1726) cited 2 Mer. 353; Dav. Conv. 5 pt. 2, 622-4.

⁴⁵ Per Wilde B. *Lyall v. Edwards* (1861) 6 H. & N. 337, 348; 30 L. J. Ex. 193, 197; 123 R. R. 547. This was a case of equitable jurisdiction under the C. L. P. Act, 1854; but before the Act courts of law would not allow a release to be set up if clearly satisfied that a court of equity would set it aside: *Phillips v. Claggett* (1843) 11 M. & W. 84; 12 L. J. Ex. 275.

⁴⁶ See the cases considered at pp. 367-399.

⁴⁷ *Gandy v. Macaulay* (1885) 31 Ch. Div. 1, where no accounts had been rendered or examined at all; twenty years had elapsed and the releasee was dead.

⁴⁸ *Miller v. Craig* (1843) 6 Beav. 433; 63 R. R. 134.

⁴⁹ *Skilbeck v. Hilton* (1866) L. R. 2 Eq. 587; but *qu.* whether the principle was rightly applied in the particular case.

⁵⁰ Notes to *Peters v. Opie* (1671) 2 Wms. Saund. 743; and see Ch. 6, pp. 204-205.

construed according to its literal terms. The rule of the common law was that "time is always of the essence of the contract." When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it.⁵¹

The rule of equity, which has long been the general rule of English jurisprudence and to which the rule at law is now formally assimilated,⁵² is to look at the whole scope of the transaction to see whether the parties really meant the time named to be of the essence of the contract. And if it appears that, though they named a specific day for the act to be done, that which they really contemplated was only that it should be done within a reasonable time; then this view will be acted upon, and a party who according to the letter of the contract is in default and incompetent to enforce it will yet be allowed to enforce it in accordance with what the the Court considers its true meaning.

"Courts of equity have enforced contracts specifically, where no action for damages could be maintained; for at law, the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases was sufficient to require the interference of courts of equity. They dispense with that which would make compliance with what the law requires oppressive; and in various cases of such contracts, they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus in the case of an estate sold by auction, there is a condition to forfeit the deposit, if the purchase be not completed within a certain time; yet the court is in the constant habit of relieving against the lapse of time: and so in the case of mortgages, and in many instances, relief is given against mere lapse of time, where lapse of time is not essential to the substance of the contract."

So said Lord Redesdale in a judgment which has taken a classical rank on this subject.⁵³ Contracts between vendors and purchasers of land are however the chief if not the only class of cases to which the rule has been habitually applied.⁵⁴

It was once even supposed that parties could not make time of the essence of the contract by express agreement; but it is now perfectly settled that they can, the question being always what was their true intention,⁵⁵ or rather "what must be judicially assumed to have been their intention."⁵⁶ "If the parties choose even arbitrarily, provided both of them intended to do so, to

⁵¹ *Parkin v. Thorold* (1852) 16 Beav. 59, 65; 96 R. R. 32, 35.

⁵² Law of Property Act, 1925, s. 41.

⁵³ *Lennon v. Napper* (1802) 2 Sch. & L. 684, cited by Knight Bruce L.J. *Roberts v. Berry* (1853) 3 D. M. G. at 289; 22 L. J. Ch. 398; 98 R. R. 143, and again adopted by the L. J.J. in *Tilley v. Thomas* (1867) L. R. 3 Ch. 61. There is no special rule of equity for the normal construction of stipulations relating to time: see *Stickney v. Keeble* [1915] A. C. 386; see per Lord Parker of Waddington at 415-6; 84 L. J. P. C. 259; *Lock v. Bell* [1931] 1 Ch. 35; 100 L. J. Ch. 22.

⁵⁴ See per Cotton L.J. 4 C. P. D. at 249.

⁵⁵ *Seton v. Slade* (1802) 7 Ves. 265, 275; 6 R. R. 124, and notes to that case in 2 Wh. & T. L. C.; *Parkin v. Thorold* (1852) 16 Beav. 59; 96 R. R. 32.

⁵⁶ *Grove J. in Patrick v. Milner* (1877) 2 C. P. D. 342, 348; 46 L. J. C. P. 537.

stipulate for a particular thing to be done at a particular time," such a stipulation is effectual. There is no equitable jurisdiction to make a new contract which the parties have not made.⁵⁷ The fact that time is not specified as to be of the essence of the contract, does not affect the general right of either party to require completion on the other part within a reasonable time, and give notice of his intention to rescind the contract if the default is continued,⁵⁸ as on the other hand conduct of the party entitled to insist on time as of the essence of the contract, such as continuing the negotiations without an express reservation after the time is past, may operate as an implied waiver of his right.⁵⁹ In mercantile contracts the presumption, if any, is that time where specified is an essential condition,⁶⁰ likewise in other cases where the nature of the business demands punctual completion.⁶¹ An express promise to do a thing "as soon as possible" binds the promisor to do it within a reasonable time, with an undertaking to do it in the shortest practicable time.⁶² The principles of our jurisprudence on this head are well embodied in the Indian Contract Act, s. 55:

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

(The Court may infer from the nature of a contract, even though no time be specified for its completion, that time was intended to be of its essence to this extent, that the contracting party is bound to use the utmost diligence to perform his part of the contract.⁶³)

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.⁶⁴

⁵⁷ Per Alderson B. *Hipwell v. Knight* (1835) 1 Y. & C. Ex. Eq. 415; 41 R. R. 304; *Steedman v. Drinkle* [1916] 1 A. C. 275; 85 L. J. P. C. 79.

⁵⁸ This is the true and only admissible meaning of the statement that time can be made of the essence of a contract by subsequent express notice. Per Fry J. *Green v. Sevin* (1879) 13 Ch. D. 589, 599; per Turner L.J. *Williams v. Glenton* (1866) L. R. 1 Ch. 200, 210. See further *Stickney v. Keeble* [1915] A. C. 386; 84 L. J. P. C. 259, especially Lord Parker's opinion.

⁵⁹ *Webb v. Hughes* (1870) L. R. 10 Eq. 281; 39 L. J. Ch. 606, and see note ⁶⁴, below.

⁶⁰ Per Cotton L.J. *Reuter v. Sala* (1879) 4 C. P. Div. at 249; 48 L. J. C. P. 492.

⁶¹ *Lock v. Bell*, note ⁵⁸, last page.

⁶² *Hydraulic Engineering Co. v. McHaffie* (1878) 4 Q. B. Div. 670, 673.

⁶³ *Macbryde v. Weekes* (1856) 22 Beav. 533; 111 R. R. 471 (contract for a lease of working mines).

⁶⁴ "It constantly happens that an objection is waived by the conduct of the parties," per James L.J. *Upperton v. Nicholson* (1871) L. R. Ch. at 443; 40 L. J. Ch. 401. And see Dart, V. & P. 424.

C. RELIEF AGAINST PENALTIES

In like manner penal provisions inserted in instruments to secure the payment of money or the performance of contracts will not be literally enforced, if the substantial performance of that which was really contemplated can be otherwise secured.⁶⁵ The most important application of this principle is to mortgages.

Not all the authorities here summarized are literally applicable to the new practice under the Law of Property Acts, but for a long time it will be necessary to understand the law as it formerly stood. A court of equity treats the contract as being in substance a security for the repayment of money advanced, and that portion of it which gives the estate to the mortgagee as mere form, "and accordingly, in direct violation of the [form of the] contract," it compels the mortgagee to reconvey on being repaid his principal, interest and costs.⁶⁶ Here again the original ground on which equity interfered was to carry out the true intention of the parties. But it cannot be said here, as in the case of other stipulations as to time, that everything depends on the intention. For the general rule "once a mortgage, and always a mortgage" cannot be superseded by any express agreement so as to make a mortgage absolutely irredeemable.⁶⁷ However, limited restrictions on the mutual remedies of the mortgagor and mortgagee, as by making the mortgage for a term certain, are allowed and are not uncommon in practice. Also there may be such a thing as an absolute sale with an option of repurchase on certain conditions; and if such is really the nature of the transaction, equity will give no relief against the necessity of observing those conditions.⁶⁸

"That this Court will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale if it appear that the parties intended it to be a mortgage is no doubt true;⁶⁹ but it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase, not acted upon, will not of itself entitle the vendor to redeem."⁷⁰

The manner in which equity deals with mortgage transactions is only an example of a more general rule:—

"Where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage or be it by way of stipulation that in case of its not being paid at the time appointed a larger sum shall

⁶⁵ In addition to the authorities cited below, see the later case of *Ex parte Hulse* (1873). L. R. 8 Ch. 1022; 43 L. J. Ch. 261.

⁶⁶ Per Romilly M.R. *Parkin v. Thorold* (1852) 16 Beav. 59, 68; 96 R. R. 32, 37; and see Lord Redesdale's judgment in *Lennon v. Napper*, note ⁶⁵, p. 407. As to the old theory of an "equity of redemption" being not an estate but a merely personal right, and its consequences, see Lord Blackburn's remarks, 6 App. Ca. at 714.

⁶⁷ *Howard v. Harris* (1683), 1 Vern. 190; *Cowdry v. Day* (1859) 1 Giff. 316, see reporter's note at 323; 1 Ch. Ca. 141; 29 L. J. Ch. 39; 114 R. R. 464. The C. A. was divided, in a peculiar case, as to the application of this principle: *Marquess of Northampton v. Pollock* (1890) 45 Ch. Div. 190; 59 L. J. Ch. 745; the opinion of the majority was upheld in H. L. [1892] A. C. 1; 61 L. J. Ch. 49. See now *Noakes & Co. v. Rice* [1902] A. C. 24; 71 L. J. Ch. 139; [*Kreglinger v. New Patagonia Meat, &c. Co., Ltd.* [1914] A. C. 25; 83 L. J. Ch. 79; *Knightsbridge Estates Trust, Ltd. v. Byrne* [1940] A. C. 613; 109 L. J. Ch. 200.]

⁶⁸ *Davis v. Thomas* (1830) 1 Russ. & M. 506; 32 R. R. 257.

⁶⁹ See *Douglas v. Culverhill* (1862) 31 L. J. Ch. 543; and so also at common law, *Gardner v. Cazenove* (1856) 1 H. & N. 423, 435, 438; 26 L. J. Ex. 17, 19, 20; 108 R. R. 659, 665, 666—667.

⁷⁰ Per Lord Cottenham C. *Williams v. Owen* (1840) 5 M. & Cr. 303, 306; 12 L. J. Ch. 207; 48 R. R. 322, 324.

become payable, and be paid, in either of those cases Equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged, or any augmentation of the debt as a penal provision, on the ground that Equity regards the contemplated forfeiture which might take place at law with reference to the estate as in the nature of a penal provision, against which Equity will relieve when the object in view, namely, the securing of the debt, is attained, and regarding also the stipulation for the payment of a larger sum of money if the sum be not paid at the time it is due, as a penalty and a forfeiture against which Equity will relieve."⁷¹

This applies not only to securities for the payment of money but to all cases "where a penalty is inserted merely to secure the enjoyment of a collateral object."⁷² In all such cases the penal sum was originally recoverable in full in a court of law, but actions brought to recover penalties stipulated for by bonds or other agreements, and land conveyed by way of mortgage, have for a long time been governed by statutes.⁷³

It would lead us too far beyond our present object to discuss the cases in which the question, often a very nice one, has arisen. whether a sum agreed to be paid upon a breach of contract is a penalty or liquidated damages. It may be noted however in passing that "the words *liquidated damages* or *penalty* are not conclusive as to the character of the sum stipulated to be paid. This must be determined from the matter of the agreement."⁷⁴

3.—PECULIAR DEFENCES AND REMEDIES DERIVED FROM EQUITY

A. DEFENCE AGAINST SPECIFIC PERFORMANCE

When by reason of a mistake (*e.g.*, omitting some terms which were part of the intended agreement) a contract in writing fails to express the real meaning of the parties, the party interested

⁷¹ Per Lord Hatherley *C. Thompson v. Hudson* (1869) L. R. 4 H. L. 1, 15; 38 L. J. Ch. 431.

⁷² Per Lord Thurlow *Sloman v. Walter* (1784) 1 Bro. C. C. 418. *Re Dagenham Dock Co.* (1873) L. R. 8 Ch. 1022, is a good modern example.

⁷³ Neither is the relation of the named sum to the actual damage a conclusive test; it may be liquidated damages though in fact less than the actual damage: *Widnes Foundry v. Cellulose Acetate Silk Co.* [1931] 2 K. B. 393; 100 L. J. K. B. 746, C. A. As to common money bonds 4 & 5 Anne, c. 16 (3 in Rev. Stat.), s. 13. As to other bonds and agreements 8 & 9 Will. III. c. 11, s. 8. The statutes (some of which have been repealed by Statute Law Revision Acts) are collected and reviewed in *Preston v. Dania* (1872) L. R. 8 Ex. 19; 42 L. J. Ex. 33. A mortgagee suing in ejectment, or on a bond given as collateral security, may be compelled by rule of Court to reconvey on payment of principal, interest, and costs: Mortgage Act, 1734. 7 Geo. II. c. 20, Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 219 (see Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 49, s. 99 (1) (f), (g), Sch. 1). Bonds of the kind last mentioned hardly occur in modern practice.

⁷⁴ Per Bramwell B. in *Betts v. Burch* (1859) 4 H. & N. 506, 511; 28 L. J. Ex. 267, 271; 118 R. R. 580. The later cases on this subject are—*Magee v. Lavell* (1874) L. R. 9 C. P. 107; 43 L. J. C. P. 131 (authorities discussed by Jessel M.R.); *Lord Elphinstone v. Monkland Iron and Coal Co.* (1886) 11 App. Ca. (Sc.) 332; *Wallis v. Smith* (1882) 21 Ch. Div. 243; 52 L. J. Ch. 145; *Willson v. Love* [1896] 1 Q. B. 626; 65 L. J. Q. B. 474, C. A.; *Webster v. Bosanquet* [1912] A. C. 394; 81 L. J. P. C. 205; *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.* [1915] A. C. 79. Cp. *Weston v. Metrop. Asylum District* (1882) 9 Q. B. Div. 404; 51 L. J. Q. B. 399, on the similar question of a penal rent. In the Indian Contract Act the knot is cut by abolishing the distinction altogether: see s. 74.

in having the real and original agreement adhered to (*e.g.*, the one for whose benefit the omitted term was) is in the following position.

If the other party sues him for the specific performance of the contract as expressed in writing, it will be a good defence if he can show that the written contract does not represent the real agreement: and this whether the contract is of a kind required by law to be in writing or not. Thus specific performance has been refused where a clause had been introduced by inadvertence into the contract.⁷⁵ It is sometimes said with reference to cases of this class that the remedy of specific performance is discretionary. But this means a judicial and regular, not an arbitrary discretion. The Court "must be satisfied that the agreement would not have been entered into if its true effect had been understood."⁷⁶

On the other hand a party cannot, at all events where the contract is required by law to be in writing, come forward as plaintiff to claim the performance of the real agreement which is not completely expressed by the written contract. Thus in the case of *Townshend v. Stangroom*⁷⁷ (referred to by Lord Hatherley when V.C. as perhaps the best illustration of the principle⁷⁸), there were cross suits,⁷⁹ one for the specific performance of a written agreement as varied by an oral agreement, the other for specific performance of the written agreement without variation; and the fact of the parol variations from the written agreement being established, both suits were dismissed. And the result of a plaintiff attempting to enforce an agreement with alleged parol variations, if the defendant disproves the variations and chooses to abide by the written agreement, may be a decree for the specific performance of the agreement as it stands at the plaintiff's cost.⁸⁰

But it is open to a plaintiff to admit a parol addition or variation made for the defendant's benefit, and so enforce specific performance, which the defendant might have successfully resisted if it had been sought to enforce the written agreement simply. This was settled in *Martin v. Pycroft*:⁸¹ "The decision of the Court of Appeal proceeded on the ground that an agreement by parol to

⁷⁵ *Watson v. Marston* (1853) 4 D. M. G. 230; 102 R. R. 100.

⁷⁶ *Watson v. Marston* (1853) 4 D. M. G. at 240; 102 R. R. 108.

⁷⁷ (1801) 6 Ves. 328; 5 R. R. 312.

⁷⁸ *Wood v. Scarth* (1855) 2 K. & J. 33, 42; 110 R. R. 88.

⁷⁹ Under the Judicature Acts there would be an action and counter-claim.

⁸⁰ See *Higginson v. Clowes* (1808) 15 Ves. 516, 525; 10 R. R. 112; and such appears to be the real effect of *Fife v. Clayton* (1807) 13 Ves. 546; 9 R. R. 220; *S. C.* more fully given, with the decree, 1 C. P. Cooper (temp. Cottenham) 351. In this case Lord Eldon laid hold on the plaintiff's offer in general terms to perform the agreement as amounting to an offer to perform "what the Court, upon hearing all the circumstances, should be of opinion was the agreement." See the notes to the case in 9 R. R. 220. But after a plaintiff has failed to support his own construction of an agreement which the Court thinks ambiguous, he cannot take advantage of such an offer contained in his own pleadings "to take up the other construction which the defendant was at one time willing to have performed": *Clowes v. Higginson* (1813) 1 Ves. & B. 524, 535; 12 R. R. 284.

⁸¹ (1852) 2 D. M. G. 785; 22 L. J. Ch. 94; 95 R. R. 324.

pay 200*l.* as a premium for . . . a lease [for which there was a complete agreement in writing not mentioning the premium] was no ground for refusing specific performance of the written agreement for the lease, where the plaintiff submitted by his bill to pay the 200*l.* The case introduced no new principle as to the admissibility of parol evidence."⁸²

It is to be observed (though the observation is now familiar) that these doctrines are in principle independent of the Statute of Frauds.⁸³ What the fourth section of the Statute of Frauds says is that in respect of the matters comprised in it no agreement not in writing and duly signed shall be sued upon. This in no way prevents either party from showing that the writing on which the other insists does not represent the real agreement; the statute interferes only when the real agreement cannot be proved by a writing which satisfies its requirements. Then there is nothing which can be enforced at all. The writing cannot, because it is not the real agreement; nor yet the real agreement, because it is not in writing. A good instance of this state of things is *Price v. Ley*.⁸⁴ The suit was brought mainly to set aside the written agreement, and so far succeeded. It appears not to have been seriously attempted to insist upon the real agreement which had not been put into writing.

B. RECTIFICATION OF INSTRUMENTS

When the parties to an agreement have determined to embody their common intention in the appropriate and conclusive form, and the instrument meant to effect this purpose is by mistake so framed as not to express the real intention which it ought to have expressed, it is possible in many cases to correct the mistake by means of a jurisdiction formerly peculiar to courts of equity and still reserved, as a matter of procedure, to the Chancery Division.

Courts of equity "assume a jurisdiction to reform instruments which, either by a fraud or mistake of the drawer, admit of a construction inconsistent with the true agreement of the parties."⁸⁵ And of necessity, in the exercise of this jurisdiction, a court of equity receives evidence of the true agreement in contradiction of the written instrument." Relief will not be refused though the party seeking relief himself drew the instrument; for "every party who comes to be relieved against an agreement which he has signed, by whomsoever drawn, comes to be relieved against his

⁸² Per Stuart V.-C. *Price v. Ley* (1863) 4 Giff. at 253.

⁸³ See per Lord Redesdale in *Clinan v. Cooke* (1802) 1 Sch. & Lef. 22, 33—39; 9 R. R. 3, 7—10.

⁸⁴ (1863) 4 Giff. 235, affirmed on appeal, 32 L. J. Ch. 534; 141 R. R. 186.

⁸⁵ The Court need not decide the point of construction: it is enough that serious doubt exists whether the terms express the true intention: *Walker v. Armstrong* (1856) 8 D. M. G. 531; 25 L. J. Ch. 798; 114 R. R. 234. The judgment of Knight Bruce L. J. is entertaining as well as profitable. Followed, *Walton's settlement* [1929] 2 Ch. 509, a rather simpler case.

own mistake."⁸⁶ The jurisdiction is a substantive and independent one, so that it does not matter whether the party seeking relief would or would not be able to get the benefit of the true intention of the contract by any other form of remedy." And, just because the right is a substantive right, the remedy will not be granted unless it is properly and distinctly claimed."⁸⁷

The manner in which the Court proceeds is put in a very clear light by the opening of Lord Romilly's judgment in the case of *Murray v. Parker*:⁸⁸

"In matters of mistake, the Court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still it is to be exercised in all cases where a deed, as executed, is not according to the real agreement between the parties. In all cases the real agreement must be established by evidence, whether parol or written; . . . if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly; if ambiguous, parol evidence may be used to express it, in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument."

Concerning the extent of the Court's jurisdiction, a good deal of controversial and rather perplexed learning (which the curious reader may find if he will at the corresponding place in former editions) has been swept away by an opinion of the Judicial Committee given by Lord Birkenhead. There had been a prevalent opinion that a contract could not be rectified if the real agreement, being within the Statute of Frauds, did not satisfy its requirements. Lord Birkenhead pointed out "that the Statute of Frauds is not allowed by any Court administering the doctrines of equity to become an instrument for enabling sharp practice to be committed. And indeed the power of the Court to rectify mutual mistake implies that this power may be exercised notwithstanding that the true agreement of the parties has not been expressed in writing. Nor does the rule make any inroad upon another principle, that the plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified; and secondly, that such agreement had been inaccurately represented in the instrument. When this is proved either party may claim, in spite of the Statute of Frauds, that the instrument on which the other insists does not represent the real agreement." Moreover "when the written instrument is rectified there is a writing which satisfies the statute." Again the long standing controversy about the power of the Court to grant specific performance of a contract with a parol variation—that is, to rectify a contract and enforce it as rectified in one and the same suit—was disposed of "by the provisions of

⁸⁶ *Ball v. Storie* (1823) 1 Sim. & St. 210, 219 : 24 R. R. 170.

⁸⁷ *Druiif v. Lord Parker* (1868) L. R. 5 Eq. 131 ; 37 L. J. Ch. 241.

⁸⁸ See *Blay v. Pollard* [1930] 1 K. B. 628 ; 96 L. J. K. B. 421, C. A.

⁸⁹ (1854) 19 Beav. 305, 308 ; 105 R. R. 153, 154.

the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24 " (now s. 43 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. 5, c. 49), which requires the Court to dispose completely, so far as possible, of all matters in controversy."⁹⁰

There remains in force, apparently, the application of the general equitable rule—rather a counsel of judicial prudence than a strict rule of evidence—that the Court will not act on "oath against oath," meaning thereby the oral and unconfirmed testimony of a plaintiff against a defendant who positively contradicts him. "There is no objection to correct a deed by parol evidence, when you have anything beyond the parol evidence to go by. But where there is nothing but the recollection of witnesses, and the defendant by his answer denies the case set up by the plaintiff, the plaintiff appears to be without a remedy."⁹¹

On the other hand, when the mistake is admitted, or not positively denied, written instruments have repeatedly been reformed on parol evidence alone.⁹²

Thus far as to the nature of the evidence required; next let us see what it must prove. It is indispensable that the evidence should amount to "proof of a mistake common to all the parties."⁹³ i.e., a common intention different from the expressed intention and a common mistaken supposition that it is rightly expressed: it matters not, as we have seen, by whom the actual oversight or error is made which causes the expression to be wrong. The leading principle of equity on the head of rectification—that there must be clear proof of a real agreement on both parties different from the expressed agreement, and that a different intention or mistake of one party alone is no ground to vary the agreement expressed in writing—was distinctly laid down by Lord Hardwicke as long ago as 1749⁹⁴

The same thing was explicitly asserted about a century later by the modern Court of Appeal:

"The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake is one

⁹⁰ *United States v. Motor Trucks, Ltd.* [1924] A. C. 196, 200, 201; 93 L. J. P. C. 46, adopting Sir E. Fry's opinion and approving *Craddock Bros. v. Hunt* [1923] 2 Ch. 136; 92 L. J. Ch. 378.

⁹¹ Lord St. Leonards in *Mortimer v. Shortall* (1842) 2 Dr. & War. 363, 374; 59 R. R. 730. See also per Alderson B. *Att.-Gen. v. Sitwell* (1835) 1 Y. & C. Ex. 559, 583; *Olley v. Fisher* (1886) 34 Ch. D. 367; 56 L. J. Ch. 208, seems to put this rule wholly on the Statute of Frauds: but it has since been decided that the statute does not apply to an action for rectification of a marriage settlement: *Johnson v. Bragge* [1901] 1 Ch. 28; 70 L. J. Ch. 41.

⁹² *Townshend v. Stangroom* (1801) 6 Ves. 328, 334; 5 R. R. 312; *Ball v. Storie* (1823) 1 Sim. & St. 210; 24 R. R. 170; *Driff v. Lord Parker* (1868) L. R. 5 Eq. 131; 37 L. J. Ch. 141; *Ex parte National Provincial Bank of England* (1876) 4 Ch. D. 241; 46 L. J. Bk. 11; *Welman v. Welman* (1880) 15 Ch. D. 570; 49 L. J. Ch. 736, where a power of revocation appearing in the first draft had been struck out in the instrument as it finally stood, and there was nothing to show how this had happened.

⁹³ Per Lord Romilly M.R. *Bentley v. Mackay* (1869) 31 Beav. at 151.

⁹⁴ *Henkle v. Royal Exch. Assee. Co.* 1 Ves. Sr. 318.

which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. . . . It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution and also must be able to shew exactly and, precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of a mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement."⁹⁵

So it has been laid down by the American Supreme Court that Equity may compel parties to perform their agreement, but has no power to make agreements for parties, and then compel them to execute the same;" to the same effect in *Rooke v. Lord Kensington*" by Lord Hatherley when V.-C.; and more recently by James L.J. when V.-C. in *Mackenzie v. Coulson*." On this principle, as we have already seen, the jurisdiction to rectify instruments does not extend beyond particular expressions. The Court cannot alter that form of instrument which the parties have deliberately chosen."

The Court therefore cannot act on proof of what was intended by one party only.¹ And when an instrument contains a variety of provisions, and some of the clauses may have been passed over without attention, "the single fact of there being no discussion on a particular point will not justify the Court in saying that a mistake committed on one side must be taken to be mutual."² The Court will not rectify an instrument when the result of so doing would be to affect interests already acquired by third parties on the faith of the instrument as it stood.³

Without derogation from the above general rules, a contract of insurance is liberally construed for the purpose of reforming the policy founded upon it in accordance with the true intention.⁴

There exists a rare class of cases in which the rule that a com-

⁹⁵ *Fowler v. Fowler* (4 De G. & J. 250, 264; 124 R. R. 234.

⁹⁶ *Hunt v. Roussaniere's Adm.* (1828) 1 Peters, 1, 14. [Ser. too, Williston, Contracts, §§ 1547 seq., and Restatement of Contracts, § 504.]

⁹⁷ (1856) 2 K. & J. 753, 764; 25 L. J. Ch. 795; 110 R. R. 456.

⁹⁸ (1869) L. R. 8 Eq. 368, 375. Cp. *Bonhote v. Henderson* [1895] 1 Ch. 742; 64 L. J. Ch. 556; affd. [1895] 2 Ch. 202, C. A.

¹ *Hills v. Rowland* (1853) 4 D. M. G. 430, 436; cp. the very peculiar case of *W. Higgins, Ltd. v. Northampton Corporation* [1927] 1 Ch. 128; 96 L. J. Ch. 38. Accordingly the Court cannot, even by way of compromise, unless all presumptive as well as ascertained interests are represented, rectify the omission of a usual clause in a settlement, framed in fact according to the settlor's express instructions, merely on the settlor's assertion that she did not understand the effect of her own instructions: *Constantinidi v. Ralli* [1935] 1 Ch. 427; 104 L. J. Ch. 249.

² *Thompson v. Whitmore* (1860) 1 J. & H. 268, 276.

³ *Blackie v. Clark* (1852) 15 Beav. 595; 92 R. R. 570.

⁴ *Equitable Insurance Company v. Hearne* (1874) 20 Wallace (Sup. Ct. U. S.) 494.

non mistake must be shown may admit of modification. The principle to be collected from the latest decision in the House of Lords, so far as the results of that decision, which was on complicated facts, are material in this place, appears to be as follows. Where one party to an instrument, or series of instruments forming one transaction, by his own default, whether consisting in executive negligence, suppression of facts, or otherwise, causes a disposition to be so framed as to frustrate the intention of another party or parties known to himself, he cannot be heard to deny that his own intention was the same.⁶ This principle, which is really a special branch of the law of estoppel, is to be applied with caution.⁶

The most frequent application of the jurisdiction of equity to rectify instruments is in the case of marriage and other family settlements,⁷ when there is a discrepancy between the preliminary memorandum or articles and the settlement as finally executed. As to marriage settlements, the distinction was formerly held that if both the articles and the settlement were ante-nuptial, the settlement should be taken in case of variance as a new agreement superseding the articles, unless expressly mentioned to be made in pursuance of the articles; but that a post-nuptial settlement would always be reformed in accordance with ante-nuptial articles. The modern doctrine of the Court has modified this as follows, so far as regards settlements executed after preliminary articles but before the marriage:

1. When the settlement purports to be in pursuance of articles previously entered into, and there is any variance, the variance will be presumed to have arisen from mistake.
2. When the settlement does not refer to the articles, it will not be presumed, but it may be proved, that the settlement was meant to be in conformity with the articles, and that any variance arose from a mistake.

In the first case the Court will act on the presumption, in the second on clear and satisfactory evidence of the mistake.⁸

A settlement may be rectified even against previous articles on the settlor's uncontradicted evidence of departure from the real intention, if no further evidence can be obtained.⁹

⁶ *Whiteley v. Delaney* [1914] A. C. 132; 83 L. J. Ch. 349 (suppression of an incumbrance); *Clark v. Girdwood* (1877) 7 Ch. Div. 9; 47 L. J. Ch. 116; *Lovesy v. Smith* (1880) 15 Ch. D. 655; 49 L. J. Ch. 809 (marriage settlement hastily and improperly prepared by husband's instructions alone).

⁶ *Blay v. Pollard* [1930] 1 K. B. 628; 96 L. J. K. B. 421, C. A.

⁷ See further on this subject, *Dav. Conv.* 3, pt. 1, Appx. No. 3.

⁸ *Bold v. Hutchinson* [1855] 5 D. M. G. 558, 567, 568; 104 R. R. 196, 202. In reforming a settlement the intent rather than the literal words of the articles will be followed; for a modern instance, see *Cogan v. Duffield* (1876) 2 Ch. Div. 44; 45 L. J. Ch. 307. As to the general principles on which courts of equity construe instruments creating executory trusts, see *Sackville-West v. Viscount Holmesdale* (1870) L. R. 4 H. L. 543, 555, 565; 39 L. J. Ch. 505.

⁹ *Smith v. Iliffe* (1875) L. R. 20 Eq. 666; 44 L. J. Ch. 755; *Hanley v. Pearson* (1879) 13 Ch. D. 545.

The fact that a provision inserted in a settlement (*e.g.*, restraint on anticipation of the income of the wife's property) is in itself usual and is generally considered proper is not a ground for the Court refusing to strike it out when its insertion is shown to have been contrary to the desire of the parties and to the instructions given by them.¹⁰ There is, however, a general presumption, in the absence of distinct or complete evidence of actual intention, that the parties intend a settlement to contain dispositions and provisions of the kind usual under the circumstances.¹¹

It is not necessary that a person claiming to have a settlement rectified should be or represent a party to the original contract, or be within the consideration of it.¹² But a deed which is wholly voluntary in its inception cannot be reformed if the grantor contests it, but must stand or fall in its original condition without alteration;¹³ the reason of this has been explained to be that an agreement between parties for the due execution of a voluntary deed is not a contract which the Court can interfere to enforce.¹⁴ The Court has power, however, to set aside a voluntary deed in part only at the suit of the grantor if he is content that the rest should stand.¹⁵

The Court will exercise caution in rectifying a voluntary settlement at the instance of the settlor alone and on his own evidence.¹⁶

An agreement will not be cancelled at the suit of one party when he has rejected a proper offer to rectify it. It was agreed between A. and B. that A. should give the exclusive right of using a patent in certain districts: a document was executed which was only a licence from A. to B. Some time afterwards B. complained that this did not carry out the intention, and A., admitting it, offered a rectification. B. refused this and sued for cancellation. Held that the relief prayed for could not be granted.¹⁷

In certain cases already mentioned for another purpose¹⁸ the plaintiff sought to reform an instrument, and satisfied the Court that it did not represent what was his own intention at the time of execution, but failed to establish that the other party's intention was the same; and the Court gave the defendant his choice of "having the whole contract annulled, or else of taking it in the form which the plaintiff intended."¹⁹ The anomalous character of these cases has already been pointed out.

¹⁰ *Torre v. Torre* (1853) 1 Sm. & G. 518; 96 R. R. 464.

¹¹ See pp. 404—405.

¹² *Thompson v. Whitmore* (1860) 1 J. & H. 268, 273.

¹³ *Brown v. Kennedy* (1863) 33 Beav. at 147.

¹⁴ *Lister v. Hodgson* (1867) L. R. 4 Eq. at 34.

¹⁵ *Turner v. Collins* (1871) L. R. 7 Ch. 329, 342; 41 L. J. Ch. 558; and see per Turner L. J. *Bentley v. Mackay* (1862) 4 D. F. J. 279, 286; 135 R. R. 145.

¹⁶ *Bonhote v. Henderson* [1895] 1 Ch. 742; 64 L. J. Ch. 556; *affid.* [1895] 2 Ch. 202, C. A.

¹⁷ *Laver v. Dennett* (1883) 109 U. S. 90. ¹⁸ Pp. 385—387.

¹⁹ *Harris v. Pepperell* (1867) L. R. 5 Eq. 1, 5; *Garrard v. Frankel* (1862) 30 Beav. 445; 31 L. J. Ch. 604; *Bloomer v. Spittle* (1872) L. R. 13 Eq. 427; 41 L. J. Ch. 369. See *May v. Platt* [1900] 1 Ch. 616; 69 L. J. Ch. 357; *Beale v. Kyle* [1907] 1 Ch. 564; 76 L. J. Ch. 294.

The Court is not prevented by the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), ss. 40, 47, from exercising its ordinary jurisdiction to rectify the resettling part of a disentailing assurance.²⁰

An agreement cannot be rectified after it has been adjudicated upon by a competent Court and performed under the direction of that Court.²¹

It was formerly sometimes said, but inexactly, that in certain cases wills may be rectified on the ground of mistake.²²

Actions for the rectification of instruments must be assigned to the Chancery Division; but where a statement of defence to an action brought in another Division is accompanied by a counter-claim for rectification, this is not a sufficient reason for transferring the action.²³

When a conveyance is rectified the order of the Court is sufficient without a new deed. A copy of the order is indorsed on the deed which is to be rectified.²⁴

A consent order, being founded on agreement of the parties, may be set aside for mistake if the facts would justify setting aside an agreement on any of the grounds considered in the foregoing discussion.²⁵ So where the mistake as to the effect of the order is on one side only, but induced, however innocently, by the act of the other.²⁶

The Court may not only rectify but rescind unilateral acts, such as appointments under a settlement or will, which have been executed under a misapprehension of material facts.²⁷ But this is outside the field of contract.

²⁰ *Hall-Dare v. Hall-Dare* (1885) 31 Ch. D. 251 ; 55 L. J. Ch. 154.

²¹ *Caird v. Moss* (1886) 33 Ch. Div. 22 ; 55 L. J. Ch. 854.

²² On this point, see the Appendix 8, p. 418.

²³ *Storey v. Waddle* (1879) 4 Q. B. Div. 289.

²⁴ *White v. White* (1872) L. R. 15 Eq. 247 ; 42 L. J. Ch. 288.

²⁵ *Huddersfield Banking Co. v. Lister & Son* [1895] 2 Ch. 273 ; 64 L. J. Ch. 523, C. A.

²⁶ *Wilding v. Sanderson* [1897] 2 Ch. 534 ; 66 L. J. Ch. 684, C. A.

²⁷ *Hood of Avalon (Lady) v. Mackinnon* [1909] 1 Ch. 476 ; 78 L. J. Ch. 300.

10

MISREPRESENTATION AND FRAUD

PART I—GENERALLY

The consent of one party to a contract may be caused by a misrepresentation made by the other of some matter, such that, if he had known the truth concerning it, he would not have entered into the contract. Putting off for a while the closer definition of the term, we see at once that there is a broad distinction between fraudulent and innocent misrepresentation. A statement may be made with knowledge of its falsehood and intent to mislead the other party, or with reckless ignorance as to its truth or falsehood. In either of these cases the making of such a statement is morally wrong and also wrongful in a legal sense, and the conduct of the party making it is called Fraud or Deceit, and may be a substantive wrong giving rise to a claim for redress in damages, independent of any contract. The present writer has endeavoured to discuss this aspect of it elsewhere.¹ As regards liabilities and claims independent of contract the difference between fraudulent and innocent representation is still of great importance. But with regard to representations inducing a promise, it is now the accepted doctrine, founded on a long course of professional understanding rather than any positive authority, that if such a representation is false in fact, even though made with honest belief in its truth, the promise induced by it is voidable at the promisor's option. "A contract of guarantee, *like any other contract*, is liable to be avoided if induced by material misrepresentation of an existing fact, even if made innocently."² The rule is the same, it is believed, everywhere.³

Statements of fact must be carefully distinguished from expressions of opinion. A man is safe in giving his honest opinion, as

¹ In "The Law of Torts," Ch. viii.

² *Mackenzie v. Royal Bank of Canada* [1934] A. C. 468, 475; 103 L. J. P. C. 81 (Jud. Comm. per Lord Atkin). [Critics of the last edition have urged that the exact point stated in the text was dealt with only incidentally in the judgment, that the decision is of persuasive authority only, that if it be applied to the sale of goods it would seriously affect the accepted doctrine of conditions and warranties and that the width of the rule which it lays down is inconsistent with Lord Atkin's acceptance of *Kennedy v. Panama, &c. Co.* (1867) L. R. 2 Q. B. 580, in *Bell v. Lever Bros., Ltd.* [1932] A. C. 161. See 14 Canadian Bar Review (1936), 784—785, and authorities there cited. We submit, however, that the citation from Lord Atkin in *Mackenzie's case* probably represents the law, although we should agree that Pollock's statement which precedes it is too widely expressed; for while Lord Atkin refers to "*material misrepresentation*" Pollock speaks of representations generally.]

³ Long settled in America. [Williston, Contracts, § 1500; Restatement of Contracts, § 470.] In British India s. 18 of the Contract Act, which unhappily reproduces one of the worst penned clauses of the draft Civil Code of New York, is obscure and calls for amendment.

an opinion, for what it may be worth. If he communicated at the same time the grounds on which he formed his opinion, or reasonable means of access to those grounds, he has done all that an honest man can do. It may be difficult to say with regard to some kinds of assertions whether they are to be taken as statements of existing fact or as the speaker's opinion of what may be expected; as where the matter in hand is the earning capacity of a business or the productiveness of land. In such cases all the circumstances have to be carefully considered.⁴

Whenever consent to a contract is obtained by deceit, the contract is voidable at the option of the party deceived, subject to the conditions to be presently mentioned. The other party cannot take advantage of his own wrong. We shall see that the working of this rule involves careful definition and distinction; but the substance of the law now rests on fairly broad and simple grounds. A man who makes positive statements to the intent that others should act upon them is bound, at least, to state only what he believes to be true.⁵

The combination of this principle with the still wider principle of responsibility for the acts and defaults of agents in the course of their employment gives rise to difficult questions, and in some cases to consequences of apparent hardship. A man who had no fraudulent intention, or who has not even been personally negligent, may be liable as for fraud.

The ground of liability in such cases used to be described as "constructive fraud," or, less aptly, "legal fraud." The word "constructive" negatives actual fraud, but affirms that the actual conditions will have similar consequences. "Constructive possession" signifies, in the same way, that an owner out of possession has certain advantages originally given only to possessors; "constructive delivery" is a change of legal possession without change of physical custody; and we speak of "constructive notice" where the existence of means of knowledge dispenses with the proof of actual knowledge.

It must be remembered that for a long time equity judges and text writers thought it necessary or prudent for the support of a beneficial jurisdiction to employ the term "Fraud" as *nomen generalissimum*.⁶ "Constructive fraud" was made to include almost every class of cases in which any transaction is disallowed, not only on grounds of fair dealing between the parties, but on grounds of public policy.⁷ This lax and ambiguous usage of the word was confusing in the books and not free from confusion in practice. Plaintiffs were too apt to make unfounded charges of fraud in fact, while a defendant who could and did indignantly repel such charges might sometimes divert attention from the real measure of his duties. Cases in which there was actual fraud or culpable

⁴ *Bisset v. Wilkinson* [1927] A. C. 177; 96 L. J. P. C. 12.

⁵ The House of Lords decided in *Derry v. Peek* (1889) 14 App. Ca. 337; 58 L. J. Ch. 864, that there is no general duty to use any degree whatever of diligence in ascertaining facts, as distinct from bare belief, in making positive statements intended for other people to act on.

⁶ At this day "legal fraud" is never heard of, and "constructive fraud" hardly ever.

⁷ *James L. J. in Torrance v. Bolton* (1872), L. R. 8 Ch. at 124.

⁸ See Story's Eq. Jurisp. ch. vii.

recklessness of truth were not sufficiently distinguished from cases in which there was only a failure to fulfil a special duty. But it seems needless at this day to pursue an obsolete verbal controversy.

Innocent representations are not necessarily harmless to the person making them. They may give rise to liability, or, as it is more exact to say, representations may give rise to liability without any need for determining whether they are innocent or otherwise (a matter sometimes far from easy to determine),⁹ in various ways. A statement made on quite reasonable grounds may nevertheless be defamatory and actionable; but this is remote from our subject. The rule of estoppel comes nearer to it. "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."¹⁰ And "whatever a man's real intention may be," he is deemed to act wilfully "if he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it."¹¹ The rule is not a rule of substantive law, in the sense that it does not declare any immediate right or claim. It is a rule of evidence, but capable of having the gravest effects on the substantive rights of parties.

Again, we have seen in Ch. 7 that the existence of a certain state of facts, or the truth of a certain assertion, may be made a condition or term of a contract, apart from any question of good faith, so that if the fact be otherwise the proposed contract may never become binding, or else there may be a non-performance or breach of the contract, with the usual consequences. Such conditions or terms are in some important kinds of contracts implied by special rules of law.

It will be observed that these possible qualities of a representation are not mutually exclusive. One and the same statement may well be a deceit and a breach of contract and capable of operating by estoppel.¹²

During a certain time some judges in the Court of Chancery seem to have thought that under certain conditions a representation which is not operative as part of a contract, or by way of

⁹ *Cp. Wasatch Mining Co. v. Crescent Mining Co.* (1893) 142 U. S. 293, 498, per Cur. :— "In equitable remedies given for fraud, accident or mistake, it is the facts as found that give the right to relief, and it is often difficult to say, upon admitted facts, whether the error which is complained of was occasioned by intentional fraud or by mere inadvertence or mistake. Indeed, upon the very same state of facts an intelligent man, acting deliberately, might well be regarded as guilty of fraud, and an ignorant and inexperienced person might be entitled to a more charitable view. Yet the injury to the complainant would be the same in either case."

¹⁰ *Pickard v. Sears* (1837) 6 A. & E. 469; 45 R. R. 538.

¹¹ *Freeman v. Cooke* (1848) 2 Ex. 654; 18 L. J. Ex. 114; 76 R. R. 711.

¹² See per Lord Blackburn in *Brownlie v. Campbell* (1880) 5 App. Ca. 925, 953. A hint of this was already given by Parke B. in *Freeman v. Cooke*, last note: see the end of the judgment.

estoppel, or as amounting to an actionable wrong, may still be binding on the person making it. But, when these three effects are duly considered, it appears that there is no other way in which it can be binding.

To say that a man is answerable for the truth of his statement is to say that it is his legal duty to see that it is borne out or to make compensation for its not being borne out. We need not here dwell on cases of deceit, or of estoppel independent of contract. Then, if the statement is of a fact, and made as an inducement to another person to enter into a contract, the substance of the duty can only be that the person making the statement undertakes that it is true. In that case must not his undertaking be a contract or a term in the contract? For if not, why should it bind him? It might peradventure work an estoppel also, but for all practical intents the estoppel is merged in the contract.

If, on the other hand, the statement is of something to be performed in the future, it must be a declaration of the party's intention unless it is a mere expression of opinion. But a declaration of intention made to another person in order to be acted on by that person is a promise or nothing. And if the promise is binding, the obligation laid upon its utterer is an obligation by way of contract and nothing else: promises *de futuro*, if binding at all, must be binding as contracts.¹³ There is no middle term possible. A statement of opinion or expectation creates, as such, no duty. If capable of creating any duty, it is a promise. If the promise is enforceable, it is a contract. The description of promise or contract in a cumbrous and inexact manner will not create a new head of law. "There must be a contract in order to entitle the party to obtain any relief."¹⁴

PART 2—MISREPRESENTATION AND NON-DISCLOSURE

So far nothing has been said of any affirmative duty to tell the whole truth in relation to the matter of a contract, as distinct from the negative duty of telling nothing but the truth. In general one is not bound by law to disclose in the treaty for a contract all known facts which may be material to the other party's judgment, nor even to remove a mistake not induced by one's own act.¹⁵ Non-disclosure of a material fact which one was not specially bound to disclose is no defence to an action for specific performance.¹⁶ And if one party asks a question which the other is not

¹³ Lord Selborne, *Maddison v. Alderson* (1883) 8 App. Ca. at 473.

¹⁴ Per Cozens-Hardy J. *Re Fickus* [1900] 1 Ch. 331, 334; 69 L. J. Ch. 161. Earlier authorities on the supposed equitable doctrine of "making representations good" are discussed in the Appendix, Note 9, which is now preserved not so much for any probable use to practitioners as for the sake of students who may still be perplexed by some of these cases. No such doctrine, I understand, has ever become current in America.

¹⁵ *Smith v. Hughes* (1871) L. R. 6 Q. B. 597; 40 L. J. Q. B. 221.

¹⁶ *Turner v. Green* [1895] 2 Ch. 205; 64 L. J. Ch. 539.

bound to answer, and it is not answered, he is not entitled to treat the other's silence as a representation;" that is, when there is really nothing beyond silence. A very slight departure from passive acquiescence might be enough to convert a lawful though scarcely laudable reserve into an actionable deceit. This must in every case be a question of fact.

There are several kinds of contracts, however, such that the one party must in the ordinary course of business take from the other, wholly or to a great extent, the description of the subject-matter of the contract. Now the parties may if they please make any part of that description a term or even a preliminary condition¹⁷ of the contract. Whether they have done so is, as we have seen, a question of construction.¹⁸ But therein the nature of the contract, and the extent to which an erroneous description or material omission may deprive either party of the benefit to be reasonably expected, will justly count for much. More than this, fixed rules on this point have been established as to particular classes of contracts, and in some of these they go to the extent of a positive duty of disclosure; not only that all information given shall be true, but that all material information shall be fully as well as truly given. [They are commonly called contracts *uberrimar fidei*.] The character and stringency of the duties thus imposed vary according to the specific character and risks of the contract. It will be convenient to take a view of the classes of contracts thus treated before we examine in detail the universal rules as to Deceit. These classes are believed to be the following. It is by no means certain, however, that the same principle may not be applicable in other forms. The development of modern commerce may bring into prominence new kinds of transactions in which the subject-matter of the contract or a material part of it, is within the peculiar knowledge of one party, and the other has to rely, in the first instance at all events, on the correctness of the statements made by him.¹⁹

(A) Insurance.

(B) Suretyship and guaranty (as to certain incidents only).

¹⁷ *Laidlaw v. Organ* (1817) 2 Wheat. 178; a sale of tobacco; the buyer knew, and the seller did not, that peace had been concluded between the U.S. and England; the seller asked if there was any news affecting the market price; the buyer gave no answer, nor did the seller insist on one. Held that the buyer's silence was not fraudulent. [The case is regarded as a leading one in the United States: Williston, § 1497, note 2.] Cp. I. C. A. s. 17, illustration (d).

¹⁸ In such a case it has been said that there is not a conditional promise, but either an absolute promise or no promise at all: Langdell, § 28. But see Holmes, "The Common Law," 304.

¹⁹ *Behn v. Burness* (1863) Ex. Ch. 3 B. & S. 751; 32 L. J. Q. B. 204; *Bannerman v. White* (1861) 10 C. B. N. S. 844; 31 L. J. C. P. 28; p. 221.

²⁰ [It was held in *With v. O'Flanagan* [1936] Ch. 575; 105 L. J. Ch. 247, that there is no distinction between contracts which require the utmost good faith and other contracts, with respect to the duty of one party, A., to inform the other, B., of a material change of circumstances which has occurred between preliminary negotiations and the conclusion of the contract, if that change renders false a representation of A. on the faith of which B. entered into the negotiations.]

(C) Sales of land.

(D) Family settlements.

(E) The contract of partnership and thence, by analogy, contracts to take shares in companies and contracts of promoters.

We proceed to follow out these topics in order. And first we shall say something in general of representations which amount to a condition or a warranty.

REPRESENTATIONS AMOUNTING TO WARRANTY OR CONDITION

The law on this subject is to be found chiefly in the decisions on the sale of goods; the principles however are of general importance, and not without analogies, as we shall presently see, in other doctrines formerly treated as peculiar to equity. We therefore mention the leading points in this place, though very briefly. In the first place a buyer has a right to expect a merchantable article answering the description in the contract;²¹ but this is not on the ground of warranty, but because the seller does not fulfil the contract by giving him something different. "If a man offers to buy *peas* of another and he sends him *beans*, he does not perform his contract; but that is not a warranty; there is no *warranty* that he should sell him *peas*; the contract is to sell *pcas*, and if he sends him anything else in their stead it is a non-performance of it."²² So that, even if it be a special term of the contract that the buyer shall not refuse to accept goods brought by sample on the score of the *quality* not being equal to sample, but shall take them with an allowance, he is not bound to accept goods of a different *kind*.²³ It is open to the parties to add to the ordinary description of the thing contracted for any other term they please, so as to make that an essential part of the contract: a term so added is a *condition*. If it be not fulfilled, the buyer is not bound to accept the goods. "Condition" is purposely not defined by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), though "warranty" is.²⁴ On a bargain and sale of specific goods with a warranty the buyer cannot reject them,²⁵ but he may obtain compensation by way of deduction from the price, or by a cross action.²⁶

²¹ *Jones v. Just* (1868) L. R. 3 Q. B. 197, 204; 37 L. J. Q. B. 89; *Drummond v. Van Ingen* (1887) 12 App. Ca. 284; 56 L. J. Q. B. 563; Sale of Goods Act, 1893, ss. 13, 14.

²² Lord Abinger C.B. in *Chanter v. Hopkins* (1838) 4 M. & W. at 404; 51 R. R. 654, 655; "as sound an exposition of the law as can be," per Martin B. *Azémar v. Casella* (1867) (Ex. Ch.) L. R. 2 C. P. 677, 679; 36 L. J. C. P. 263. There is a class of cases, however, in which it is commonly and perhaps conveniently, said that there is a *warranty* that the goods shall be merchantable besides the *condition* that they shall answer the description: *Mody v. Gregson* (1868) L. R. 4 Ex. 49; 38 L. J. Ex. 12.

²³ *Azémar v. Casella* (1867) L. R. 2 C. P. 431, in Ex. Ch. 677; 36 L. J. C. P. 124, 263.

²⁴ S. 62; and see App. II., Note (A), in Sir M. Chalmers' edition of the Act.

²⁵ Sale of Goods Act, s. 53; *Heyworth v. Hutchinson* (1867) L. R. 2 Q. B. 477; 36 L. J. Q. B. 270; [see Benjamin, *Sale* (7th ed.), 1028, note (y)]; and cp. *Varley v. Whipp* [1900] 1 Q. B. 513; 69 L. J. Q. B. 333.

²⁶ The reduction of the price can be only the actual loss of value: any further damages must be the subject of a counter-claim (under the old practice a *separate action*): *Mondel v. Steel* (1841) 8 M. & W. 858, 871; 10 L. J. Ex. 426; 58 R. R. 890.

No small confusion has been caused by the use of the word *warranty* where the thing meant in the first instance is really a *condition*. The proper meaning of *warranty* appears to be an agreement which refers to the subject-matter of a contract, but, not being an essential part of the contract either by the nature of the case or by the agreement of the parties, is "collateral to the main purpose of such contract."²⁷ The so-called implied warranties of quality, fitness, and condition of goods sold are really conditions; if the goods tendered in performance of the contract do not satisfy those conditions, they may be rejected. But the buyer may, if he thinks fit, accept the goods and claim damages for the defect; in other words, he may treat the breach of condition as a breach of warranty. And after goods have been accepted, or the property in specific goods contracted for has passed to the buyer, "the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."²⁸ Conditions of this kind include a warranty from the first, and may be reduced to a warranty if the buyer does not take advantage of them in time. But a condition and a warranty are not therefore the same thing.²⁹

There is no rule of law that every assertion by a seller of a fact unknown to the buyer is a warranty.³⁰

We pass on to the contracts above mentioned as being under exceptional rules [contracts *uberimae fidei*].

1.—INSURANCE

Concealment of material facts will avoid a contract of insurance of any kind.³¹

As to marine insurance, not only misrepresentation but concealment³² of a material fact, "though made without any fraudulent intention, vitiates the policy,"³³ that is, makes it voidable at the underwriter's election.³⁴

²⁷ See note ²⁴.

²⁸ Sale of Goods Act, 1893, s. 11. [As to sales of real estate, see *Terrene, Ltd. v. Nelson* (1937) 157 L. T. 254—257.]

²⁹ Accordingly a term in the contract excluding warranty does not exclude the seller's liability in damages if after acceptance the goods are found not to be of the description contracted for: *Wallis v. Pratt* [1911] A. C. 394; 80 L. J. K. B. 1058.

³⁰ *Hailbut v. Buckleton* [1913] A. C. 30; 82 L. J. K. B. 245. See further as to the overlapping of condition and warranty in English law and the peculiar reasons for it, Lord Haldane's opinion in *Dawsons, Ltd. v. Bonnin* [1922] 2 A. C. 413, 422; 91 L. J. P. C. 210 (a Scottish appeal).

³¹ *Seaton v. Heath* [1899] 1 Q. B. 782, 792; 68 L. J. Q. B. 631, C. A. (revd. in H. L. on facts only, *nom. Seaton v. Burnard* [1900] A. C. 135; 69 L. J. Q. B. 409).

³² This is the usual word, but *non-disclosure* would be more accurate.

³³ *Ionides v. Pender* (1874) L. R. 9 Q. B. 531, 537; 43 L. J. Q. B. 227; 2 Wms. Saund, 555-9.

³⁴ See *Morrison v. Universal Marine Insurance Co.* (1873) L. R. 8 Ex. 197, 205; 42 L. J. Ex. 115. The settled rules are now codified in the Marine Insurance Act, 1906, ss. 17—20.

For this purpose a material fact does not, on the one hand, mean only such a fact as is "material to the risks considered in their own nature"; nor on the other hand does it include everything that might influence the underwriter's judgment: the rule is "that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act."³⁵ The only exception is that the insured is not bound to communicate anything which is such matter of general knowledge that he is entitled to assume the underwriter knows it already:³⁶ and the obligation extends not only to facts actually within the knowledge of the assured, but to facts which in the ordinary course of business he ought to know, though by the fraud or negligence of his agent he does not know.³⁷

As regards life insurance, the assured is bound to disclose all material facts within his knowledge affecting the life on which the insurance is made.³⁸ But where that life is not his own but some other person's, that person is not his agent, and if "the life" or his referees make false statements which are passed on in good faith by the assured, their falsehood will not of itself avoid the contract.³⁹

Practically life policies are almost always framed with some sort of express reference to the statements made by the assured as to the health and circumstances of "the life." Not unfrequently it is provided that the declaration of the assured shall be the basis of the contract; and if the declaration thus made part of the contract is not confined to the belief of the party, but is positive and unqualified, then the contract is avoided by any part of the

³⁵ Parsons on Insurance, adopted per cur. *Ionides v. Pender* (1874) 1. R. 9 Q. B. at 539. What falls within this description is a question of fact: *Stribley v. Imperial Marine Insurance Co.* (1876) 1 Q. B. D. 507; 45 L. J. Q. B. 396. And the policy will be vitiated by concealment of a fact material to guide the underwriter's judgment, though not material to the risk insured against in itself: *Rivaz v. Gerussi* (1880) 6 Q. B. Div. 222; 50 L. J. Q. B. 176.

³⁶ *Morrison v. Universal Marine Insurance Co.* (1873) L. R. 8 Ex. 40; 42 L. J. Ex. 115.

³⁷ *Proudfoot v. Montefiore* (1867) L. R. 2 Q. B. 511; 36 L. J. Q. B. 225. This applies only to the agent through whom the insurance was actually effected: *Blackburn v. Vigers* (1887) 12 App. Ca. 531; 57 L. J. Q. B. 114; unless there is a continuous negotiation by more than one agent: *Blackburn v. Haslam* (1888) 21 Q. B. D. 144; 57 L. J. Q. B. 479. Non-disclosure by an agent of the assured, without fraudulent intention, has been held to avoid the policy only to the extent of the loss or risk arising from the particular facts so withheld: *Stribley v. Imperial, &c. Co.*, note ³⁵; but see per Lord Watson, 12 App. Ca. at 540; and *qu.* whether this exceptional rule is not abrogated by the Marine Insurance Act.

³⁸ See authorities collected in *London Assurance v. Mansel* (1879) 11 Ch. D. 363; 48 L. J. Ch. 331. Facts are not material for this purpose if, not being expressly made the basis of the contract, they are not such as would lead a reasonable insurer to refuse the risk or insist on a higher premium: *Mutual Life Insce. Co. of New York v. Ontario Metal Products Co.* [1925] A. C. 344; 94 L. J. P. C. 60.

³⁹ *Wheldon v. Hardisty* (1857) 8 E. & B. 232, in Ex. Ch. 285; 26 L. J. Q. B. 265; 27 *ib.* 241; 112 R. R. 535. The judges appear to have been inclined to restrict the view taken before and since of the *uberrima fides* generally required in this contract, unless the *dicta* (which in any case decide nothing) can be taken as limited to the special case before them.

statement being in fact untrue," though not to the knowledge of the assured,⁴⁰ or by the concealment of any material fact.⁴¹

On the same ground the grant of a life annuity by the Commissioners for the Reduction of the National Debt was set aside at the suit of the Crown, the age of the life having been mis-stated; not so much on the ground of misrepresentation simply, as because, considering the statutory powers and duties of the commissioners, "it was an essential part of the contract itself that the representation should be true."⁴²

The principles applicable to insurance against accidents are the same.⁴³

The contract of fire insurance is treated in somewhat the same way as that of marine insurance (which it resembles in being a contract of indemnity),⁴⁴ though not to the same extent. The description of the insured premises annexed to a fire policy amounts to a warranty (or rather a condition) that at the date of the policy the premises correspond to the description, or at least have not been altered so as to increase the risk; and also that during the time specified in the policy the assured will not voluntarily make any alteration in them such as to increase the risk. The description must be the basis of the contract, for the terms of insurance can be calculated only on the supposition that the description in the policy shall remain substantially true while the risk is running.⁴⁵ Where an insurance is expressed to be "on same rate terms and identical interest" as other existing insurances on the same property, this is a condition of the contract.⁴⁶

The principles applicable to insurance against miscellaneous

⁴⁰ It need not be shown that the particular mis-statement was material: *Anderson v. Fitzgerald* (1853) 4 H. L. C. 484; 94 R. R. 202. Cp. *Thomson v. Weems* (1884) (Sc.) 9 App. Ca. 671.

⁴¹ *Macdonald v. Law Union Insurance Co.* (1874) L. R. 9 Q. B. 328; 43 L. B. Q. B. 131.

⁴² *London Assurance v. Mansel* (1879) 11 Ch. D. 363; 48 L. J. Ch. 331. Probably a material fact means for this purpose a fact such that its concealment makes the statement actually furnished, though literally true, so misleading as it stands as to be in effect untrue.

⁴³ *A.-G. v. Ray* (1874) L. R. 9 Ch. 397, 407; 43 L. J. Ch. 321, per Mellish, L. J. expressly comparing the case of a life policy where the representations of the assured are made the basis of the contract.

⁴⁴ *Bowden v. London, Edinburgh and Glasgow Assce. Co.* [1892] 2 Q. B. 534; 61 L. J. Q. B. 792, C. A., a curious example of the insurers being bound by their agent's knowledge. Cp. *Biggar v. Rock Life Assce. Co.* [1902] 1 K. B. 516; 71 L. J. K. B. 79, where the applicant allowed the company's local agent to fill in a form for him and signed it without examination, and falsity in some of the statements so signed was held to avoid the policy.

⁴⁵ *Darrell v. Tibbitts* (1880) 5 Q. B. Div. 560; 50 L. J. Q. B. 33.

⁴⁶ *Sillem v. Thornton* (1854) 3 E. & B. 868; 23 L. J. Q. B. 362; 97 R. R. 808; where it was held accordingly that the addition of a third storey to a house described as being of two storeys was a material alteration, and discharged the insurer; and see further, as to what amounts to material misdescription, *Forbes & Co.'s claim* (1875) L. R. 19 Eq. 485; 44 L. J. Ch. 761. [As to non-disclosure of material facts, see *Ewer v. National Employers' &c. Association, Ltd.* (1937) 157 L. T. 16.]

⁴⁷ And the use of the word "warranted" makes no difference: *Barnard v. Faber* [1893] 1 Q. B. 340; 62 L. J. Q. B. 159, C. A.

risks appear to be the same. Only those facts need be disclosed which are material to the risk actually undertaken.⁴⁸

2.—SURETYSHIP AND GUARANTY

The contract of suretyship "is one in which there is no universal obligation to make disclosure";⁴⁹ but it has peculiar incidents after it is formed, which bring it within our present scope. A surety is released from his obligation by any misrepresentation, or concealment amounting to misrepresentation, of a material fact on the part of the creditor.⁵⁰ The language used in different cases is hardly consistent: the later decisions establish however that the rule is not parallel to that of marine insurance. The creditor is not bound to volunteer information as to the general credit of the debtor or anything else which is not part of the transaction itself to which the suretyship relates: and on this point there is no difference between law and equity.^{50a} But the surety is entitled to know the real nature of the transaction be guarantees and of the liability he is undertaking: and he generally and naturally looks to the creditor for information on this point, although he usually is acting at the debtor's request and as his friend, and so relies on him for collateral information as to general credit and the like. In that case the creditor's description of the transaction amounts to, or is at least evidence of, a representation that there is nothing further that might not naturally be expected to take place between the parties to a transaction such as is described. Whether a circumstance not disclosed is such that by implication it is represented not to exist depends on the nature of the transaction and is generally a question of fact.⁵¹ Thus where the suretyship was for a cash credit opened with the principal debtor by a bank, and the cash credit was in fact applied to pay off an old debt to the bank, the House of Lords held that the bank was not bound to disclose this, no actual agreement being alleged or shown that the money should be so supplied, and the thing being one which the surety might naturally expect to happen.⁵² So the

⁴⁸ Thus an insurer of a surety's solvency is not entitled to be informed of all the circumstances and conditions of the principal debt: *Seaton v. Burnand* [1900] A. C. 135; 69 L. J. Q. B. 409. [Compulsory insurance of motor vehicles against third party risks has created a new topic in the law of insurance. See Hughes, *Road Users' Rights, Liabilities and Insurance* (1938).]

⁴⁹ *Railton v. Mathews* (1844) 10 Cl. & F. 934; 59 R. R. 308; and see per Romer L.J. *Seaton v. Heath* [1899] 1 Q. B. 782, 792.

⁵⁰ *Fry J. Davies v. London and Provincial Marine Insurance Co.* (1878) 8 Ch. D. at 475; 47 L. J. Ch. 511. [So, too, Lord Wright M.R. in *Wilt v. O'Flanagan* [1936] Ch. 575, 581—582; 105 L. J. Ch. 247.]

^{50a} *Kennedy L.J. in L. G. O. Co. v. Holloway* [1912] 2 K. B. 72, 87; 81 L. J. K. B. 603, adopting the statement in the text; *Pledge v. Buss* (1860) Johns. 663; 123 R. R. 281; *Wythes v. Labouchere* (1858-9) 3 De G. & J. 593, 609; 121 R. R. 238, approving *North British Insurance Co. v. Lloyd* (1854) 10 Ex. 523; 24 L. J. Ex. 14; 102 R. R. 686.

⁵¹ *Lee v. Jones* (1863) 14 C. B. N. S. 386, in Ex. Ch. 17 C. B. N. S. 482, 503; 34 L. J. C. P. 131, 138; 142 R. R. 467, which may be taken as a judicial commentary on the rule given in *Hamilton v. Watson* (1845) 12 Cl. & F. 109; 69 R. R. 58.

⁵² *Hamilton v. Watson* (1845) 12 Cl. & F. 109; 69 R. R. 58; *acc. Pledge v. Buss* (1860) Johns. 663; 123 R. R. 281; *Cooper v. National Provincial Bank, Ltd.* [1945] 2 All E.R. 641].

creditor is not bound to tell the surety that the proposed guaranty is to be substituted for a previous one given by another person.⁵³ But the surety is not liable if there is a secret agreement or arrangement which substantially varies the nature of the transaction or of the liability to be undertaken: as where the surety guarantees payment for goods to be sold to the principal debtor, but the real bargain, concealed from the surety, is that the debtor shall pay for the goods a nominal price, exceeding the market price, and the excess shall be applied in liquidation of an old debt: ⁵⁴ or where the loan to be guaranteed is obtained not in the ordinary way, but by an advance of trust funds of which the principal debtor himself is a trustee.⁵⁵ In *Lee v. Jones*⁵⁶ there was a continuing guaranty of an agent's liabilities in account with his employers. He was in fact already indebted to them beyond the whole amount guaranteed by the surety's agreement, which was so worded as to cover existing as well as future liabilities. The surety was not informed of this, and the recitals in the agreement, though not positively false, were of a misleading and dissembling character. The majority of the Court of Exchequer Chamber held that there was evidence of "studied effort to conceal the truth" amounting to fraud. On the whole it appears from this case and *Railton v. Mathews*⁵⁷ that the concealment from the surety of previous defaults of the principal debtor, when there is a continuing guaranty of conduct or solvency, is in itself evidence of fraud, and the Court of Appeal has applied this principle to the case of a surety for the fidelity of a servant, although the non-disclosure was in fact not fraudulent.⁵⁸ Where a person has become a surety on the faith of the creditor's representation that another will become co-surety, he is not bound if that other person does not join; and in equity it makes no difference that the guaranty was under seal.⁵⁹ Where a guaranty was given to certain judgment creditors in consideration of their postponing a sale under an execution already issued against the principal debtor, but in fact they did not stop the sale, being unable to do so without the consent of the other persons interested, it was held that the guaranty was inoperative;⁶⁰ but perhaps this case is best

⁵³ *North British Insurance Co. v. Lloyd* (1854) 10 Ex. 523; 24 L. J. Ex. 14; 102 R. R. 686. Cp. *Seaton v. Burnand*, note ⁵¹, p. 425.

⁵⁴ *Pidcock v. Bishop* (1825) 3 B. & C. 605; 27 R. R. 430; 1 C. A. § 143, illus. b.

⁵⁵ *Squire v. Whitton* (1848) 1 H. L. C. 333, decided however chiefly on the broader ground that there cannot be a contract of suretyship in blank, for no creditor was ever named or specified to the surety.

⁵⁶ (1863) 17 C. B. N. S. 482; 34 L. J. C. P. 131.

⁵⁷ (1844) 10 Cl. & F. 934; 59 R. R. 308.

⁵⁸ *L. G. O. Co. v. Holloway* [1912] 2 K. B. 72; 81 L. J. K. B. 603, where the difference between such a case and that of a guaranty to a bank is considered.

⁵⁹ *Rice v. Gordon* (1847) 11 Beav. 265; 83 R. R. 153; *Evans v. Bremridge* (1856) 2 K. & J. 174; 8 D. M. G. 100; 25 L. J. Ch. 334; 110 R. R. 156. The rule does not apply if the surety's remedies are not really diminished; *Cooper v. Evans* (1867) L. R. 4 Eq. 45; 36 L. J. Ch. 431, where the principal debtor had not executed the bond, but had executed a separate agreement under seal.

⁶⁰ *Cooper v. Joel* (1859) 1 D. F. J. 240; 125 R. R. 432.

accounted for as one of simple failure of consideration; for the consideration for the guaranty was not merely the credit given to the principal debtor, but the immediate stopping of the sale.

The authorities, taken as a whole, establish that as between creditor and surety there is in point of law no positive duty to give information as to the relations between the creditor and the principal debtor, but the surety is discharged if there is actual misrepresentation, and that silence may in a particular case be equivalent to an actual representation, whether it is so being a question of fact.⁶¹ So far as these rules attach special duties to the creditor they do not apply to a mere contract of indemnity.⁶²

3.—SALES OF LAND

A misdescription materially affecting the value, title, or character of the property sold will make the contract voidable at the purchaser's option and this notwithstanding special conditions of sale providing that errors of description shall be matter for compensation only. *Flight v. Booth*⁶³ is a leading case on this subject. The contract was for the sale of leasehold property, and the lease imposed restrictions against carrying on several trades, of which the particulars of sale named only a few: it was held that the purchaser might rescind the contract and recover back his deposit. Tindal C.J. put the reason of the case on exactly the same grounds which, as we shall immediately see, have been relied on in like cases by courts of equity.

"Where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may be supposed that but for misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts the purchaser may be considered as not having purchased the thing which was really the subject of the sale."

The rule so stated has been unanimously approved in the Court of Appeal.⁶⁴

So in *Phillips v. Caldcleugh*,⁶⁵ where the contract was for the sale of "a freehold residence"—which means free of all incumbrances⁶⁶—and it appeared that the property was subject to

⁶¹ Cp. I. C. A. ss. 142—144. S. 143: "Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance is invalid" is probably not intended to go beyond the English law.

⁶² *Way v. Hearn* (1862) 13 C. B. N. S. 292; 32 L. J. C. P. 34; 134 R. R. 538; but the point of that case is rather that there was no misrepresentation *dans locum contractui*. Cp. *Seaton v. Burnand* [1900] A. C. 135; 69 L. J. Q. B. 409.

⁶³ (1834) 1 Bing. N. C. 370, 377; 41 R. R. 599, 604.

⁶⁴ *Re Fawcett and Holmes* (1889) 42 Ch. Div. 150; 58 L. J. Ch. 763. For a later example, see *Puckett and Smith's contract* [1902] 2 Ch. 258; 71 L. J. Ch. 666, C. A.; for a minor misdescription held inoperative: *Courcier and Harrold's contract* [1923] 1 Ch. 565; 92 L. J. 598.

⁶⁵ (1868) L. R. 4 Q. B. 159, 161; 38 L. J. Q. B. 68.

⁶⁶ *Halsey v. Grant* (1806) 13 Ves. 73, 77; 9 R. R. 143, 145.

restrictive covenants of some kind, the purchaser was held entitled to rescind, though the covenants were in a deed prior to that fixed by the contract as the commencement of the title.

Questions of this kind arise chiefly in suits for specific performance between vendors and purchasers of real estate, when it is found that the actual tenure, quantity, or description of the property varies from that which was stated in the contract. The effect of the conditions of sale in the particular instance has almost always to be considered, and the result of the variance may be very different according to these, and according to the amount and importance of the discrepancy between the description and the fact. A complete or nearly complete system of rules has been established by the decisions.

(i) "If the failure is not substantial, equity will interfere" and enforce the contract at the instance of either party with proper compensation.⁶⁷ The purchaser, "if he gets substantially that for which he bargains, must take a compensation for a deficiency in the value."⁶⁸ Here the contract is valid and binding on both parties, and the case is analogous to a sale of specific goods with a collateral warranty. Failure to disclose a fact affecting the value of the property but not the title may be enough to debar the vendor from claiming specific performance (which has never quite lost its character of a discretionary remedy) but not enough to justify the purchaser in rescinding.⁶⁹

(ii) There is a second class of cases in which the contract is voidable at the option of the purchaser, so that he cannot be forced to complete even with compensation at the suit of the vendor, but may elect either to be released from his bargain or to perform it with compensation. "Generally speaking, every purchaser has a right to take what he can get, with compensation for what he cannot get,"⁷⁰ even where he is not bound to accept what the other has to give him.⁷¹

However a purchaser's conduct may amount to an affirmation of the contract and so deprive him of the right to rescind, but without affecting the right to compensation;⁷² again, special conditions

⁶⁷ See last note.

⁶⁸ *Dyer v. Hargrave* (1805) 10 Ves. 506, 508; 8 R. R. 36, 37. The deficiency must be in the subject-matter described: misrepresentation in a collateral agreement is no ground for specific performance with compensation: *Rutherford v. Acton-Adams* [1915] A. C. 866; 84 L. J. P. C. 238.

⁶⁹ *Beyfus v. Lodge* [1925] Ch. 350; 95 L. J. Ch. 27 (claim and counter-claim both dismissed without costs).

⁷⁰ *Hughes v. Jones* (1861) 3 D. F. J. 307, 315; 31 L. J. Ch. 83; *Leyland v. Illingworth* (1860) 2 D. F. J. 248, 252.

⁷¹ "If a person possessed of a term for 100 years contracts to sell the fee he cannot compel the purchaser to take, but the purchaser can compel him to convey the term": per Lord Eldon, *Wood v. Griffith* (1818) 1 Swanst. at 54; 18 R. R. 27 (though in this case not with compensation see next page); and see *Mortlock v. Buller* (1804) 10 Ves. 292, 315; 7 R. R. 417; *Nelthorpe v. Holgate* (1844) 1 Coll. C. C. 203; 66 R. R. 46.

⁷² *Hughes v. Jones*, note ⁷⁰.

may exclude the right to insist on compensation and leave only the right to rescind.⁷³

Under this head fall cases of misdescription affecting the value of the property, such as a statement of the existence of tenancies, not showing that they are under leases for lives at a low rent;⁷⁴ or an unqualified statement of a recent occupation at a certain rent, the letting value of the property having been meanwhile ascertained to be less, and that occupation having been peculiar in its circumstances;⁷⁵ or the description of the vendor's interest in terms importing that it is free from incumbrances—such as "immediate absolute reversion in fee simple"—where it is in fact subject to undisclosed incumbrances.⁷⁶

The treatment of this class of cases in equity is analogous to the rules applied at common law to the sale of goods not specifically ascertained by sample or with a warranty: see pp. 424-425.

The doctrine that a vendor who has less than he undertook to sell is bound to give so much as he can give with an abatement of the price applies, it is to be understood, only where the vendor has contracted to give the purchaser something which he professed to be, and the purchaser thought him to be, capable of giving. When a husband and wife had agreed to sell the wife's estate (her interest being correctly described and known to the purchaser), and the wife would not convey, the Court refused to compel the husband to convey his own interest alone for an abated price.⁷⁷

Specific performance with compensation is granted only where the compensation is capable of assessment: for example, not where the defect consists of undisclosed restrictive covenants.⁷⁸ Also the Court will not order vendors who sell as trustees to perform their contract with compensation, on account of the prejudice to the *cestui que trust* which might ensue.⁷⁹

It is now settled (after many conflicting decisions and *dicta*) that a purchaser otherwise entitled to compensation can recover it after

⁷³ *Cordingley v. Cheesebrough* (1862) 3 Giff. 496; 4 D. F. J. 379; 31 L. J. Ch. 617, where the purchaser claiming specific performance with compensation, and having rejected the vendor's offer to annul the contract and repay the purchaser his costs, was made to perform the contract unconditionally. See further as to the effect of conditions of this kind, *Mauson v. Fletcher* (1870) L. R. 6 Ch. 91; 40 L. J. Ch. 131; *Re Terry and White's contract* (1886) 32 Ch. Div. 14; 55 L. J. Ch. 345. The authorities were reviewed by Buckley J. *Jacobs v. Ravell* [1900] 2 Ch. 858; 69 L. J. Ch. 879. The same judge in *Jackson and Haden's contract* [1905] 1 Ch. 603; 74 L. J. Ch. 389, where there was a total failure of title as to minerals, ordered specific performance with compensation notwithstanding the usual condition empowering the vendor to rescind if unable to remove a defect of title.

⁷⁴ *Hughes v. Jones* (1861) 3 D. F. J. 307; 31 L. J. Ch. 83.

⁷⁵ *Dimmock v. Hallett* (1866) 2 Ch. 21; 36 L. J. Ch. 146.

⁷⁶ *Torrance v. Bolton* (1872) 8 Ch. 118; 42 L. J. Ch. 177. Of the peculiar character of the non-disclosure in that case presently. Cp. *Phillips v. Caldcleugh* (1868) L. R. 4 Q. B. 159; 38 L. J. Q. B. 68; p. 430. As to the proper mode of assessing compensation in a case of mis-statement of profits, see *Powell v. Elliot* (1875) L. R. 10 Ch. 424.

⁷⁷ *Castle v. Wilkinson* (1870) 5 Ch. 534; 39 L. J. Ch. 843; in *Barker v. Cox* (1876) 4 Ch. D. 464; 46 L. J. Ch. 62, the full purchase-money had been paid and the facts were otherwise peculiar.

⁷⁸ *Rudd v. Lascelles* [1900] 1 Ch. 815; 69 L. J. Ch. 396.

⁷⁹ *White v. Cuddon* (1842) 8 Cl. & F. 766; 54 R. R. 176.

he has taken a conveyance and paid the purchase-money in full."⁶⁰

(iii) But lastly the variance may be so material (either in quantity, or as amounting to a variance in *kind*) as to avoid the sale altogether and to prevent not merely the general jurisdiction of the Court as to compensation, but even special provisions for that purpose, from having any application. "If a man sells freehold land, and it turns out to be copyhold, that is not a case for compensation;"⁶¹ so if it turns out to be long leasehold, that is not a case for compensation; so if one sells property to another who is particularly anxious to have the right of sporting over it, and it turns out that he cannot have the right of sporting because it belongs to somebody else . . . In all those cases the Court simply says it will avoid the contract, and it will not allow either party to enforce it, unless the person who is prejudiced by the error be willing to perform the contract without compensation."⁶² A failure of title as to a part of the property sold which, though small in quantity, is important for the enjoyment of the whole may have the same effect.⁶³ This class of cases agrees with the last in the contract being voidable at the option of the party misled, but it differs from it in this, that if he elects to adopt the contract at all he must adopt it unconditionally, since compulsory performance with compensation would here work the same injustice to the one party that compulsory performance without compensation would work to the other. Such was the result in the case now cited of the real quantity of the property falling short by nearly one-half of what it had been supposed to be.⁶⁴ But in a later

⁶⁰ *Palmer v. Johnson* (1884) 13 Q. B. Div. 351; 53 L. J. Q. B. 348. See the former cases there discussed.

⁶¹ Specific performance refused where the land was enfranchised copyhold and the minerals were reserved to the lord: *Bellamy v. Debenham* [1891] 1 Ch. 412; 60 L. J. Ch. 166, C. A. And conversely, a man who buys an estate as copyhold was not bound to accept it if it is in fact freehold. For "the motives and fancies of mankind are infinite; and it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another": *Ayles v. Cox* (1852) 16 Beav. 23; 96 R. R. 13. But on a sale of mixed freehold and copyhold a variance in the respective amounts did not avoid the contract: *Hudson v. Cook* (1872) L. R. 13 Eq. at 420. As to leaseholds, it is a settled though perhaps not a reasonable rule that a contract to sell property held under a lease is *prima facie* a contract to show title to an original lease: *Camberwell and S. London Building Society v. Holloway* (1879) 13 Ch. D. 754; 49 L. J. Ch. 361.

⁶² *Earl of Durham v. Legard* (1865) 34 Beav. 611, 613; 34 L. J. Ch. 589.

⁶³ *Arnold v. Arnold* (1880) 14 Ch. Div. 270. Where particulars of sale were misleading as to boundaries and frontage, the purchaser was held entitled to rescind unconditionally: *Brewer v. Brown* (1884) 28 Ch. D. 309; 54 L. J. Ch. 605.

⁶⁴ The price asked had been fixed by reference to the rental alone. *Qu.* how the case would have stood could a price proportional to the area have been arrived at. And see *Swaisland v. Dearsley* (1861) 27 Beav. 430; 131 R. R. 656 (where it is left doubtful whether the purchaser could or could not have enforced the contract with compensation). Cp. D. 18. 1. de cont. empt. 22—24, enunciating precisely the same principle as that applied by our Courts of equity. *Hanc legem venditionis: Si quid sacri vel religiosi est, eius venit nihil, supervacuam non esse, sed ad modica loca pertinere: ceterum si omne religiosum, vel sacrum, vel publicum venierit, nullam esse emptionem*: and see *ead. tit.* 18, 40 *pr.* In *Whittemore v. Whittemore* (1869) L. R. 8 Eq. 603, a case of material deficiency in quantity, it was held that a condition of sale providing generally that errors of description should be only matter of compensation did apply, but another excluding compensation for errors in quantity did not; so that on the whole the purchaser could not rescind, but was entitled to compensation.

case where the vendors were found to be entitled only to an undivided moiety of the property which they had professed to sell as an entirety, the Court found no difficulty in ordering specific performance with an abatement of half the price at the suit of the purchaser, as no injustice would be done to the vendors, who would be fully paid for all they really had to sell.⁸⁶ The real question is whether the deficiency is such as to be fairly capable of a money valuation.⁸⁶ It is said that where it is in the vendor's power to make good the description of the property, but not by way of money compensation, he can enforce the contract on condition of doing so, but not otherwise. A lot of building land (part of a larger estate intended to be sold together) was sold under restrictive conditions as to building, and in particular that no public-house was to be built; the purchaser assumed from the plan and particulars of sale, and in the opinion of the Court with good reason, that the whole of the adjoining property would be subject to like restrictions. One small adjacent plot had in fact been reserved by the vendor out of the estate to be sold, so that it would be free from restrictive covenants; but this did not sufficiently appear from the plan. The vendor sued for specific performance. It was held that he was entitled to a decree only on the terms of entering into a restrictive covenant including the reserved plot.⁸⁷ But it is submitted that this and like cases might as well or better be dealt with by applying the older and simpler rule that the framer of an ambiguous description is justly held to the construction least favourable to himself.

This third class of cases may be compared (though not exactly) to a sale of goods subject to a condition or "warranty in the nature of a condition," so that the sale is "to be null if the affirmation is incorrect."⁸⁸

A purchaser who in a case falling under either of the last two heads exercises his option to rescind the contract may sue in the Chancery Division to have it set aside, and recover back in the same action any deposit and expenses already paid under the contract.⁸⁹ And it seems that there is an independent right to sue in equity for the return of the deposit and expenses, at all events if there are any accompanying circumstances to afford ground for

⁸⁶ *Bailey v. Piper* (1874) L. R. 18 Eq. 683; 43 L. J. Ch. 704; *Horrocks v. Rigby* (1878) 9 Ch. D. 180; 47 L. J. Ch. 800, where the moiety was so incumbered that the vendor in the result got nothing but an indemnity: *Wheatley v. Slade* (1830) 4 Sim. 126; 33 R. R. 100, is practically overruled by these cases. Similarly as to leasehold: *Burrow v. Scammell* (1881) 19 Ch. D. 175; 51 L. J. Ch. 296, where apparently *Bailey v. Piper* was overlooked. *Maw v. Topham* (1854) 19 Beav. 576; 105 R. R. 251, is distinguishable, as there the purchaser knew or ought to have known that a good title could not be made to the whole.

⁸⁸ See *Dyer v. Hargrave* (1805) 10 Ves. at 507; 8 R. R. at 38.

⁸⁷ *Baskcomb v. Beckwith* (1866) L. R. 8 Eq. 100; 38 L. J. Ch. 536. It does not appear that the defendant objected to performance on the terms he had understood and accepted.

⁸⁸ *Bannerman v. White* (1861) 10 C. B. N. S. 844; 31 L. J. C. P. 28; 128 R. R. 953.

⁸⁹ E.g., *Stanton v. Tattersall* (1853) 1 Sm. & G. 529; 96 R. R. 471; *Torrance v. Bolton* (1872) L. R. 8 Ch. 118; 42 L. J. Ch. 177.

equitable jurisdiction, such as securities having been given of which the specific restitution is claimed."

To return to the more general question, it is the duty of the vendor to give a fair and unambiguous description of his property and title. He is therefore bound to disclose any material defect in the title or the property which is within his exclusive knowledge and not likely to be discovered by the purchaser with ordinary care.⁹⁰ And notwithstanding the current maxim about *simplex commendatio*, language of general commendation—such as a statement that the person in possession is a most desirable tenant—is deemed to include the assertion that the vendor does not know of any fact inconsistent with it. A contract obtained by describing a tenant as "most desirable" who had paid the last quarter's rent in instalments and under pressure has been set aside at the suit of the purchaser.⁹¹ If the vendor does not intend to offer for sale an unqualified estate, the qualifications should appear on the face of the particulars.⁹² In *Torrance v. Bolton*⁹³ an estate was offered for sale as an immediate reversion in fee simple. At the auction conditions of sale were read aloud from a manuscript, but no copy given to the persons who attended the sale. One of these conditions showed that the property was subject to three mortgages. The plaintiff in the suit had bid and become the purchaser at the sale, but without having, as he alleged, distinctly heard the conditions or understood their effect. The Court held that the particulars were misleading; that the mere reading out of the conditions of sale was not enough to remove their effect and to make it clear to the mind of the purchaser what he was really buying; and that he was entitled to have the contract rescinded and his deposit returned. Mere silence as to facts capable of influencing a buyer's judgment, but not such as the seller professes or undertakes to communicate, is not of itself any breach of duty.⁹⁴ Describing a leasehold shop, the use of which is restricted by covenant to one trade, as "valuable business premises" is a grave misrepresentation and is not cured by a condition imputing notice of the title to the purchaser.⁹⁵

A misleading description may be treated as a misrepresentation

⁹⁰ *Aberaman Ironworks Co. v. Wickens* (1868) L. R. 4 Ch. 101, where the contract having been rescinded by consent before the suit was held not to deprive the Court of jurisdiction.

⁹¹ Such as the existence of an award under a Building Act which imposes a future liability on the owner: *Carlish v. Salt* [1906] 1 Ch. 335; 75 L. J. Ch. 175. If a defect of this kind is not so material as to be within the principle of *Flight v. Booth* (p. 430) non-disclosure is only matter for compensation: *Shepherd v. Craft* [1911] 1 Ch. 521; 80 L. J. Ch. 170.

⁹² *Smith v. Land and House Property Corporation* (1884) 28 Ch. Div. 7; 51 L. T. 718.

⁹³ *Hughes v. Jones* (1861) 3 D. F. J. 307, 314; 31 L. J. Ch. 83; 130 R. R. 145. As to the duty of disclosing restrictive covenants: *Ebsworth and Tidy's contract* (1889) 42 Ch. Div. 23, 47, 51; 58 L. J. Ch. 665.

⁹⁴ (1872) L. R. 8 Ch. 118; 42 L. J. Ch. 177; *dist. Blaiberg v. Keeses* [1906] 2 Ch. 175; 75 L. J. Ch. 464, where a genuine question of title was fairly disclosed.

⁹⁵ *Coaks v. Boswell* (1886) 11 App. Ca. 232—235.

⁹⁶ *Charles Hunt, Ltd. v. Palmer* [1931] 2 Ch. 287; 100 L. J. Ch. 356.

even if it is in terms accurate: for example, where property was described as "in the occupation of A." at a certain rental, and in truth A. held not under the vendor, but under another person's adverse possession," or where immediate possession is material to the purchaser, and the tenant holds under an unexpired lease for years which is not disclosed." A misleading statement or omission made by mere heedlessness or accident may deprive a vendor of his right to specific performance, even if such that a more careful buyer might not have been misled."

All this proceeds on the supposition that the vendor's property and title are best known to himself, as almost always is the case. But the position of the parties may be reversed: a person who has become the owner of a property he knows very little about may sell it to a person well acquainted with it, and in that case a material misrepresentation by the purchaser makes the contract voidable at the vendor's option.¹ So it is where the purchaser has done acts unknown to the vendor which alter their position and rights with reference to the property: as where there is a coal mine under the land and the purchaser has trespassed upon it and raised coal without the vendor's knowledge; for here the proposed purchase involves a buying up of rights against the purchaser of which the owner is not aware.²

On a sale under the direction of the Court a person offering to buy is not under any extraordinary duty of disclosure. It is not the law "that, because information on some material point or points is offered, or is given on request, by a purchaser from the Court, it must therefore be given on all others as to which it is neither offered nor requested, and concerning which there is no implied representation, positive or negative, direct or indirect, in what is actually stated."³

Vendors of land may, and constantly do in practice, sell under conditions requiring the purchaser to assume particular states of fact and title. But such conditions must not be misleading as to any matter within the vendor's knowledge.⁴ "The vendor is not at liberty to require the purchaser to assume as the root of his title that which documents within his possession show not to be the fact, even though those documents may show a perfectly good title on another ground": and if this is done even by a perfectly innocent oversight on the part of the vendor or his advisers,

⁹⁷ *Lachlan v. Reynolds* (1853) Kay, 52; 23 L. J. Ch. 8; 101 R. R. 523.

⁹⁸ *Caballero v. Henty* (1874) L. R. 9 Ch. 447; 43 L. J. Ch. 635.

⁹⁹ *Jones v. Rimmer* (1880) 14 Ch. Div. 588; 49 L. J. Ch. 775.

¹ *Haygarth v. Wearing* (1871) L. R. 12 Eq. 320; 40 L. J. Ch. 775 (where an executed conveyance was set aside, but as to this see p. 437). Cp. the Indian Transfer of Property Act, 1882, s. 55.

² *Phillips v. Homfray* (1871) L. R. 6 Ch. 770, 779.

³ *Coaks v. Boswell* (1886) 11 App. Ca. 232, 440; 55 L. J. Ch. 761, revg. s. c. 27 Ch. Div. 424, mainly on the facts.

⁴ *Heywood v. Mallalieu* (1883) 25 Ch. D. 357; 53 L. J. Ch. 492 (definite adverse claims known to a vendor must be disclosed even if he thinks them unfounded).

specific performance will not be enforced." A special condition limiting the time for which title is to be shown must be fair and explicit, and "give a perfectly fair description of the nature of that which is to form the root of title."⁸

The House of Lords decided in *Wilde v. Gibson*⁹ that the vendor's silence as to a right of way over the property, of the existence of which he was not known to be aware, was no ground for setting aside the contract. This reversed the decision of Knight Bruce V.-C.,⁸ who held that the silence of the particulars taken together with the condition of the property (for the way had been disclosed) amounted to an assertion that no right of way existed. In any view it seems an extraordinary, not to say dangerous, doctrine to say that a vendor is not bound to know his own title, so far at least as with ordinary diligence he may know it; and the case was severely criticized by Lord St. Leonards.⁹ The Irish case relied on by the Lords as a direct authority may be distinguished on the ground that the representation there made by the lessor that there was no right of way was made not merely with an honest belief, but with a reasonable belief in its truth.¹⁰

Lord Campbell said that a court of equity will not set aside an executed conveyance on the ground of misrepresentation or concealment, but only for actual fraud:¹¹ this dictum has not been uniformly followed, but the latest authority¹² does follow it.

⁸ *Broad v. Munton* (1879) 12 Ch. Div. 131, per Cotton L.J. at 149; 48 L. J. Ch. 837 whether this would be sufficient ground for rescinding the contract, *quære*, per Jesse M.R. 12 Ch. Div. at 142; *Nottingham Brick Co. v. Butler* (1886) 16 Q. B. Div. 778 55 L. J. Q. B. 280, where the vendor's solicitor erroneously denied the existence of restrictive covenants contained in deeds prior to those which he had read. Cf. L. Q. R. ii, 414, 415.

⁹ *Re Marsh and Earl Granville* (1883) 24 Ch. Div. 11, 22; 53 L. J. Ch. 81, where the purchaser was held not bound to accept as the commencement of title a voluntary deed not stated in the contract to be such.

⁷ (1848) 1 H. L. C. 605; 73 R. R. 191; and see note on s. c. below, *nom. Gibson v. D'Este*, 60 R. R. 263.

⁸ S. c. *nom. Gibson v. D'Este* (1843) 2 Y. & C. 542; 60 R. R. 262.

⁹ *Sugd. Law of Property*, 614, 637, &c.

¹⁰ Indeed the Court seems to have thought it *was* true, notwithstanding the adverse result of an indictment for stopping the alleged public way: *Lagge v. Croker* (1811) 1 Ball & B. 506; 12 R. R. 49; *Sugd. op. cit.* 657. In *Wilde v. Gibson* the purchaser's case was unfortunately prejudiced by the introduction of a charge of actual fraud which was abandoned in argument.

¹¹ 1 H. L. C. 632. [See, too, Lord Thankerton in *Spence v. Crawford* [1939] 3 All E. R. 271, 280.]

¹² *Saddon v. North Eastern Salt Co.* [1905] 1 Ch. 326; 74 L. J. Ch. 199; and see per Cotton L.J. in *Soper v. Arnold* (1887) 37 Ch. Div. 96, 102; 57 L. J. Ch. 145. *Heygarth v. Wearing* (1871) L. R. 12 Eq. 320; 40 L. J. Ch. 577; and *Hart v. Swaine* (1877) 7 Ch. D. 42; 47 L. J. Ch. 5, are *contra*. In *M'Culloch v. Gregory* (1855) 1 K. & J. 286; 24 L. J. Ch. 246; 103 R. R. 86, where a will was misstated in the abstract so as to conceal a defect of title, but the purchaser omitted to examine the originals, Wood V.-C. said that "if the conveyance had been executed, the purchaser must have taken all the consequences" because of his neglect; not, therefore, by reason of any such sweeping rule as asserted by Lord Campbell: 1 K. & J. 291. [Mr. H. A. Hammelmann, in 55 L. Q. R. (1939) 90—105, contends that the doctrine of rescission is applicable to all cases where *restitutio in integrum* is possible and is not limited to executory contracts. He also points out with reference to *Saddon's* case that the Judicial Committee in *MacKenzie v. Royal Bank of Canada* [1934] A. C. 468; 103 L. J. P. C. 81, rescinded a contract that had been executed. Note also *Spence v. Crawford* [1939] 3 All E. R. 271, decided shortly after Mr. Hammelmann's article was published.]

As a general result of the authorities there seems to be no doubt that on sales of real property it is the duty of the party acquainted with the property to give substantially correct information at all events to the extent of his own actual knowledge,¹³ of all facts material to the description or title of the estate offered for sale, but not of extraneous facts affecting its value: the seller, for example, is not bound to tell the buyer what price he himself gave for the property.¹⁴

*[The general rule is not applicable as between vendor and purchaser or lessor and lessee.¹⁵ For the defective state of land or of a ruinous house sold or let by A. to B., A. is not liable apart from express contract or unless he has acted fraudulently. With respect to a house, the reason given by Erle C.J. in 1863¹⁶ and constantly repeated in later cases¹⁷ was that "fraud apart, there is no law against letting a tumble-down house"; with respect to a lease of land, the reason is that when a tenant takes land he must (subject to any stipulation in the lease) look and judge for himself in what state it is—*caveat lessee*:¹⁸ so, too, for the purchase of land the rule is *caveat emptor*.¹⁹ The vendor or lessor is free from liability even if he knows of the defect or has brought it about himself.²⁰ The immunity given by the Common Law to the vendor and the lessor bears hardly upon the purchaser and the lessee, and the Housing Act, 1936,²¹ has recognized this by placing a limited responsibility on the lessor of a house for human habitation.]

4.—FAMILY SETTLEMENTS

In the negotiations for family settlements and compromises it is the duty of the parties and their professional agents not only to abstain from misrepresentations but to communicate to the other parties all material facts within their knowledge affecting the rights to be dealt with. The omission to make such communica-

¹³ See *Joliffe v. Baker* (1883) 11 Q. B. Div. 255; 52 L. J. Q. B. 609, but that case is of little authority, if any, on the question of contract: see per A. L. Smith J. in *Palmer v. Johnson* (1884) 12 Q. B. D. at 37, explaining his own part in *Joliffe v. Baker*. Neither vendors nor their solicitors are bound to answer a general inquiry as to non-apparent incumbrances: *Re Ford and Hill* (1879) 10 Ch. Div. 365.

¹⁴ *Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App. Cas. 1218, 1267.

* [The author's original paragraph has been rewritten in view of later cases and legislation.]

¹⁵ [*Keates v. Cadogan* (1851) 10 C. B. 591; 20 L. J. C. P. 76; 84 R. R. 715. This does not apply to matters of title: *Mostyn v. West Mostyn Coal, &c. Co.* (1876) 1 C. P. D. 145; 45 L. J. C. P. 401.]

¹⁶ [*Robbins v. Jones* (1863) 15 C. B. (N. S.) 221, 241; 33 L. J. C. P. 1.]

¹⁷ [*E.g.*, Lord Macnaghten in *Cavalier v. Pope* [1906] A. C. 428, 430; 75 L. J. K. B. 609; Scrutton L.J. in *Bottomley v. Bannister* [1932] 1 K. B. 458, 469; 101 L. J. K. B. 46.]

¹⁸ [*Cheater v. Cater* [1918] 1 K. B. 247, 252, 255, 256; 87 L. J. K. B. 449.]

¹⁹ [Williams, Vendor and Purchaser (4th ed. 1936), 637—639, 759—761.]

²⁰ [*Bottomley v. Bannister* (note 17); *Shirvell v. Hackwood Estates Co., Ltd.* [1938] 2 K. B. 577; 107 L. J. K. B. 713; *Davis v. Foots* [1940] 1 K. B. 116; 109 L. J. K. B. 385. Cf. 54 L. Q. R. (1938) 439—462; 2 Modern Law Review (1938), 215—221.]

²¹ [26 Geo. 5 & 1 Edw. 8, c. 51, s. 2, re-enacting on this point the Housing Act, 1925 (15 Geo. 5, c. 14), s. 1.]

tion, even without any wrong motive, is a ground for setting aside the transaction. "Full and complete communication of all material circumstances is what the Court must insist on."²³ "Without full disclosure honest intention is not sufficient," and it makes no difference if the non-disclosure is due to an honest but mistaken opinion as to the materiality or accuracy of the information withheld.²³ The operation of this rule is not affected by the leaning of equity, as it is called, towards supporting re-settlements and similar arrangements for the sake of peace and quietness in families.²⁴

5.—PARTNERSHIP, CONTRACTS TO TAKE SHARES IN COMPANIES, AND CONTRACTS OF PROMOTERS

The contract of partnership is always described as one in which the utmost good faith is required. So far as this principle applies to the relations of partners after the partnership is formed, it belongs to the law of partnership as a special and distinct subject; and in fact the principle is worked out in definite rules to such an extent that it is seldom appealed to in its general form. But it also applies to the transactions preceding the formation of a partnership, or rather its full and apparent constitution. For example, an intending partner must not make a profit out of a dealing undertaken by him on behalf of the future firm.²⁵ There is little or no direct authority to show that a person inviting another to enter into partnership with him is bound not only to abstain from misstatement, but to disclose everything within his knowledge that is material to the prospects of the undertaking. But the existence of such a duty (the precise extent of which must be determined in each case by the relative position and means of knowledge of the parties) is postulated by the stringent rules which have been laid down as binding on the promoters of companies. These are expressed with the more strictness, inasmuch as the public to whom promoters address themselves are for the most part not versed in the particular kind of business proposed, but are simply persons in search of an investment for their money, and with slight means at hand, if any, of verifying the statements made to them.

"The public," it is said, "who are invited by a prospectus to join in any new adventure, ought to have the same opportunity

²² *Gordon v. Gordon* (1816-19) 3 Sw. 400, 473; 19 R. R. 230, 241, 242.

²³ *Gordon v. Gordon* (1816-9) 3 Sw. 477; 19 R. R. 244. How far does this go? It can hardly be a duty to communicate mere gossip on the chance of there being something in it. Probably the test is (as in the case of marine insurance, p. 425) whether the judgment of a reasonable man would be affected. *Cp. Heywood v. Mallalieu* (1883) 25 Ch. D. 357; 53 L. J. Ch. 492.

²⁴ *Ib.*; *Fane v. Fane* (1875) L. R. 20 Eq. 698.

²⁵ Partnership Act, 1890, s. 29; *Fawcett v. Whitehouse* (1829) 1 Russ. & M. 132; 32 R. R. 163. Yet the duty is incident, not precedent, to the contract of partnership; for if there were not a complete contract of partnership there would be no duty at all.

of judging of everything which has a material bearing on its true character as the promoters themselves possess":²⁶ and those who issue a prospectus inviting people to take shares on the faith of the representations therein contained are bound "not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as an inducement to take shares."²⁷ Therefore if untrue or misleading representations are made as to the character and value of the property to be acquired by a company for the purposes of its operations,²⁸ the privileges and positions secured to it, the amount of capital,²⁹ or the amount of shares already subscribed for,³⁰ a person who has agreed to take shares on the faith of such representations, and afterwards discovers the truth, is entitled to rescind the contract and repudiate the shares, if he does so within a reasonable time and before a winding-up has given the company's creditors an indefeasible right to look to him as a contributory.

There is likewise a fiduciary relation between a promoter and the company in its corporate capacity, which imposes on the promoter the duty of full and fair disclosure in any transaction with the company, or even with persons provisionally representing the inchoate company before it is actually formed.³¹ Promoters who form a company for the purpose of buying their property are not entitled to deal with that company as a stranger.³² They must either provide it with "a board of directors who can and do exercise an independent and intelligent judgment on the transaction"³³ or give full notice that the directors are not independent; there may be cases in which all the original members of the company necessarily have such notice.³⁴ "The old familiar principles of the law of agency and of trusteeship have been extended and very properly extended to meet such cases."³⁵ A shareholder may be

²⁶ Lord Chelmsford in *Central Ry. Co. of Venezuela v. Kisch*. (1867) L. R. 2 H. L. 99 113; 36 L. J. Ch. 849.

²⁷ *Kindersley V.-C. New Brunswick, &c. Co. v. Muggeridge* (1860) 1 Dr. & Sm. 363, 381; 30 L. J. Ch. 242, adopted by Lord Chelmsford, *l.c.*

²⁸ *Reese River Silver Mining Co. v. Smith* (1869) L. R. 4 H. L. 64; 39 L. J. Ch. 849, affg. *s. c. nom. Smith's case* (1867) L. R. 2 Ch. 604. As to a company's responsibility for statements made in good faith in express reliance on an expert report, see *Re Pacaya, &c. Co.* [1914] 1 Ch. 542; 83 L. J. Ch. 432.

²⁹ *Central Ry. Co. of Venezuela v. Kisch*. (note ²⁶).

³⁰ *Wright's case* (1871) L. R. 7 Ch. 55; 41 L. J. Ch. 1; *Moore and de la Torre's case* (1874) L. R. 18 Eq. 661; 43 L. J. Ch. 751.

³¹ *New Sombrero Phosphate Co. v. Erlanger* (1877) 5 Ch. Div. 73, per James L. J. at 118; 46 L. J. Ch. 425; affd. in H. L. *nom. Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App. Ca. 1218; 48 L. J. Ch. 73; *Bagnall v. Carlton* (1877) 6 Ch. Div. 371; 47 L. J. Ch. 30; and see the whole subject (the details of which belong to company law) discussed in *Lagunas Nitrate Co. v. Lagunas Synd.* [1899] 2 Ch. 392; 68 L. J. Ch. 699, C. A.; *Leeds and Hanley Theatre of Varieties* [1902] 2 Ch. 809; 72 L. J. Ch. 1, C. A.

³² *Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App. Ca. at 1268.

³³ *Ib.* at 1229, 1236, 1255.

³⁴ *Lagunas Nitrate Co. v. Lagunas Synd.* [1899] 2 Ch. 392; 68 L. J. Ch. 699, C. A.

³⁵ *Sydney, &c. Co. v. Bird* (1886) 33 Ch. Div. 85, 94.

entitled to rescind his contract with the company on the ground of a material misrepresentation in a preliminary prospectus issued by promoters before the company was formed.³⁶

The Companies Act, 1929 (19 & 20 Geo. 5, c. 23), re-enacting in substance the provisions of the earlier Companies Acts, enacts (s. 35) that every company prospectus "must state" a number of specified particulars. It would, therefore, seem that any misstatement or omission, with knowledge of the facts, of any of these particulars will be treated as fraudulent, and that all and every of them are conclusively declared to be material. Any liability under the general law is expressly saved,³⁷ so that the established case-law remains fully applicable.

CONTRACT TO MARRY

Thus much of the classes of contracts to which special duties of this kind are incident. The absence of any such duty in other cases is strongly exemplified by the contract to marry. Here there is no obligation of disclosure, except so far as the woman's chastity is an implied condition. The non-disclosure of a previous and subsisting engagement to another person³⁸ or of the party's own previous insanity,³⁹ is no answer to an action on the promise. If promises to marry are to give a right of action one would think the contract should be treated as one requiring the utmost good faith: but such are the decisions.

Marriage itself is not avoided even by actual fraud,⁴⁰ but the reasons for this are obviously of a different kind: nor is a marriage settlement rendered voidable by the wife's non-disclosure of previous misconduct.⁴¹

The general principle as to misrepresentation stated at the head of this chapter was in fact established long after special rules were applied to special kinds of contracts by the authorities we have now surveyed. Perhaps it is well that it came late; for if equity judges had generalized the rule under the old practice they might have made it more refined and less convenient.

As to voluntary gifts the rule is that a gift obtained by a misrepresentation of fact made, however innocently, by the donee,

³⁶ *Re Metropolitan Coal Consumers' Assn., Karberg's case* [1892] 3 Ch. 1; 61 L. J. Ch. 741, C. A.

³⁷ Sub-s. (6).

³⁸ *Beachey v. Brown* (1860) E. B. & E. 796; 29 L. J. Q. B. 105; 113 R. R. 892.

³⁹ *Baker v. Cartwright* (1861) 10 C. B. N. S. 124; 30 L. J. C. P. 364; 128 R. R. 640.

⁴⁰ *Mass v. Mass* [1897] P. 263, 269; 66 L. J. P. 154. Fraud is material only when it is such as "procures the appearance without the reality of consent"; per Sir F. H. Jeune. Some of the language used in *Scott v. Sebright* (1886) 12 P. D. 21, 23, a decision on very peculiar facts held to come within this last-mentioned category, cannot be supported. [*Hussein v. Hussein* [1938] P. 159; 107 L. J. P. 105, is a recent instance of a decree of nullity of marriage where the union was induced by duress on the part of the man.]

⁴¹ *Evans v. Carrington* (1860) 2 D. F. J. 481; 30 L. J. Ch. 364; 129 R. R. 158. It is there said however that non-disclosure of adultery would be enough to avoid a separation deed.

may be recovered back by the donor on the discovery of the mistake. Such gifts must be regarded as conditional on the truth of the representation.⁴²

PART 3—FRAUD OR DECEIT⁴³

Fraud generally includes misrepresentation. Its specific mark is the presence of a dishonest intention on the part of him by whom the representation is made or of recklessness equivalent to dishonesty. In this case we have a mistake of one party caused by a representation of the other, which representation is made by deliberate words or conduct with the intention of thereby procuring consent to the contract, and without a belief in its truth.

There are some instances of fraud, however, in which one can hardly say there is a misrepresentation except by a forced use of language. It is fraudulent to enter into a contract with the design of using it as an instrument of wrong or deceit against the other party. Thus a separation deed is fraudulent if the wife's real object in consenting or procuring the husband's consent to it is to be the better able to renew a former illicit intercourse which has been concealed from him. "None shall be permitted to take advantage of a deed which they have fraudulently induced another to execute that they may commit an injury against morality to the injury and loss of the party by whom the deed is executed."⁴⁴ So it is fraud to obtain a contract for the transfer of property or possession by a representation that the property will be used for some lawful purpose when the real intention is to use it for an unlawful purpose.⁴⁵ It has been said that it is not fraud to make a contract without any intention of performing it, because peradventure the party may think better of it and perform it after all: but this was in a case where the question arose wholly on the form of the pleadings, and in a highly technical and now happily impossible manner.⁴⁶ And both before and since it has repeatedly been considered a fraud in law to buy goods with the intention of not paying for them⁴⁷ Here it is obvious that the party would not

⁴² *Re Glubb, Bamfield v. Rogers* [1900] 1 Ch. 354; 69 L. J. Ch. 278, C. A.

⁴³ [For American law, see Williston, *Contracts*, §§ 1486—1534, and *Restatement of Contracts*, §§ 470—491.]

⁴⁴ *Evans v. Carrington* (1860) 2 D. F. 481, 501; 30 L. J. Ch. 364; 129 R. R. 158; cp. *Evans v. Edmonds* (1853) 13 C. B. 777; 22 L. J. C. P. 211; 93 R. R. 732, where, however, express representation was averred.

⁴⁵ *Feret v. Hill* (1854) 15 C. B. 207; 23 L. J. C. P. 185; 100 R. R. 318, concedes this, deciding only that possession actually given under the contract cannot be treated as a mere trespass by the party defrauded.

⁴⁶ *Hemingway v. Hamilton* (1838) 4 M. & W. 115; 51 R. R. 497. It is by no means clear that the Court really meant to go so far; see Pref. to 51 R. R.

⁴⁷ *Ferguson v. Carrington* (1829) 9 B. & C. 59; *Load v. Green* (1846) 15 M. & W. 216; 15 L. J. Ex. 113; 71 R. R. 627; *White v. Garden* (1851) 10 C. B. 919, 923; 20 L. J. C. P. 166; 84 R. R. 846, 849; *Clough v. L. & N. W. Ry. Co.* (1871) L. R. 7 Ex. 26; 41 L. J. Ex. 17; *Ex parte Whittaker* (1875) L. R. 10 Ch. 446, 449, per Mellish L. J. 44 L. J. Bk. 91; *Donaldson v. Farwell* (1876) 93 U. S. 631. But it is not such a "false representation or other fraud" as to constitute a misdemeanour under s. 11, sub-s. (19) of the Debtors Act, 1860 *Ex parte Brett* (1875) 1 Ch. Div. 151; 45 L. J. Bk. 17.

enter into the contract if he knew of the fraudulent intention: but the fraud is not so much in the concealment as in the character of the intention itself. It would be ridiculous to speak of a duty of disclosure in such cases. Still there is ignorance on the one hand and wrongful contrivance on the other, such as to bring these cases within the more general description of fraud given above (p. 358).

The party defrauded is entitled, and in modern times has always been entitled at law as well as in equity, to rescind the contract. "Fraud in all courts and at all stages of the transaction has, I believe, been held to vitiate all to which it attaches."⁴⁴

We shall now consider the elements of fraud separately: and first the false representation in itself. It does not matter whether the representation is made by express words or by conduct, nor whether it consists in the positive assertion or suggestion of that which is false, or in the active concealment of something material to be known to the other party for the purpose of deciding whether he shall enter into the contract. These elementary rules are so fully settled that it will suffice to give a few instances.

There may be a false statement of specific acts: this seldom occurs in a perfectly simple form. *Canham v. Barry*⁴⁵ is a good example. There the contract was for the sale of a leasehold. The vendor was under covenant with his lessor not to assign without licence, and had ascertained that licence would not be refused if he could find an eligible tenant. The agreement was made for the purpose of one M. becoming the occupier, and the purchaser and M. represented to the vendor that M. was a respectable person and could give satisfactory references to the landlords, which was contrary to the fact. This was held to be a fraudulent misrepresentation of a material fact such as to avoid the contract. A more frequent case is where a person is induced to acquire or become a partner in a business by false accounts of its position and profits.⁴⁶

Or the representation may be of a general state of things: thus it is fraud to induce a person to enter into a particular arrangement by an incorrect and unwarrantable assertion that such is the usual mode of conducting the kind of business in hand.⁴⁷ How far it must be a representation of existing facts will be specially considered.

"Active concealment" seems to be the appropriate description for the following sorts of conduct: taking means appropriate to the nature of the case to prevent the other party from learning a material fact—such as using contrivances to hide the defects of goods sold: or making a statement true in terms as far as it goes,

⁴⁴ Per Wilde B. *Udell v. Atherton* (1861) 7 H. & N. at 181; 30 L. J. Ex. 337; 126 R. R. 390.

⁴⁵ (1855) 15 C. B. 597; 24 L. J. C. P. 100; 100 R. R. 503.

⁴⁶ E.g. *Rawlins v. Wickham* (1858) 3 De G. & J. 304; 28 L. J. Ch. 188; 121 R. R. 134. The cases where contracts to take shares have been held voidable for misrepresentation in the prospectus are of the same kind.

⁴⁷ *Reynell v. Sprye* (1852) 1 D. M. G. at 680; 21 L. J. Ch. 633; 91 R. R. 228, 244.

but keeping silence as to other things which if disclosed would alter the whole effect of the statement, so that what is in fact told is a half truth equivalent to a falsehood:⁵² or allowing the other party to proceed on an erroneous belief to which one's own acts have contributed.⁵³ It is sufficient if it appears that the one party knowingly assisted in inducing the other to enter into the contract by leading him to believe that which was known to be false.⁵⁴ Thus it is where one party has made an innocent misrepresentation, but on discovering the error does nothing to undeceive the other.⁵⁵ If, when he has better knowledge, he does not remove the error to which he contributed in excusable ignorance, he is no longer excused. In effect he is continuing the representation with knowledge of its falsity.

That which gives the character of fraud or deceit to a representation untrue in fact is that it is made without positive belief in its truth; not necessarily with positive knowledge of its falsehood. Where a false representation amounts to an actionable wrong, it is always in the party's choice, as an alternative remedy, to seek rescission of the contract, if any, which has been induced by the fraud: and it is settled that a false representation may be a substantive ground for damages though it is not shown that the person making the statement knew it to be false. It is enough to show that he made it as being true within his own knowledge, with a view to secure some benefit to himself, or to deceive a third person, and without believing it to be true.⁵⁶

Mere ignorance as to the truth or falsehood of a material assertion which turns out to be untrue must be treated as equivalent to knowledge of its untruth. "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue."⁵⁷ In other words, wilful ignorance may have the

⁵² *Peek v. Gurney* (1873) L. R. 6 H. L. 392, 403; 43 L. J. Ch. 19; *Stewart v. Wyoming Rancho Co.* (1888) 128 U. S. 383, 388.

⁵³ *Hill v. Gray* (1816) 1 Stark. 434, 18 R. R. 802, as explained in *Keates v. Earl Cadogan* (1851) 10 C. B. 591, 600; 20 L. J. C. P. 76; 84 R. R. 715, 718; *qu.* if the explanation does not really overrule the particular decision, per Lord Chelmsford, L. R. 6 H. L. 391.

⁵⁴ Per Blackburn J. *Lee v. Jones* (1863) 17 C. B. N. S. at 507; 34 L. J. C. P. at 140; 142 R. R. at 484.

⁵⁵ *Reynell v. Sprye* (1852) 1 D. M. G. at 709; *Redgrave v. Hurd* (1881) 20 Ch. Div. at 12, 13; 51 L. J. Ch. 113; but as to the difference there assumed between equity and common law, see per Bowen L. J. in *Newbigging v. Adam* (1886) 34 Ch. Div. at 594; 56 L. J. Ch. 275. [American law is the same as Pollock's statement in the text: Williston, § 1497; Restatement of Contracts, § 472 (1) (a).]

⁵⁶ *Taylor v. Ashton* (1843) 11 M. & W. 401; 12 L. J. Ex. 469; 63 R. R. 635; *Evans v. Edmonds* (1853) 13 C. B. 777; 22 L. J. C. P. 211; 93 R. R. 732.

⁵⁷ Per Lord Cairns *Reese River Silver Mining Co. v. Smith* (1869) L. R. 4 H. L. 79; *Rawlins v. Wickham* (1858) 3 De G. & J. 304, 316; 28 L. J. Ch. 188; 121 R. R. 134. At common law the same rule was given by Maule J. in *Evans v. Edmonds* (1853) 13 C. B. 777, 786; 22 L. J. C. P. 211; 93 R. R. 732, 739. "I conceive that if a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself or to deceive a third person, he is guilty of a fraud, for he

same consequences as fraud.⁵⁸ So may ignorance which, though not wilful, is reckless: as when positive assertions of fact are made as if founded on the party's own knowledge, whereas in truth they are merely adopted on trust from some other person. The proper course in such a case is to refer distinctly to the authority relied upon.⁵⁹

However it is now settled in England that the want of any reasonable grounds for belief in one's assertion is evidence, but only evidence, that it was uttered without any real belief.⁶⁰

Silence is equivalent to misrepresentation for these purposes if "the withholding of that which is not stated makes that which is stated absolutely false," but not otherwise.⁶¹

If a man expects, however honestly, that a certain state of things will shortly exist, he is not thereby justified in asserting by words or conduct that it does now exist, and any such assertion, if others have acted on the faith of it to their damage, ought to be a ground of action for deceit, and is of course ground for rescinding any contract obtained by its means. A stranger who accepts a bill as agent for the drawee on the chance of his ratifying the acceptance⁶² acts at his peril. But we have learnt from the House of Lords that directors of a tramway company may say they have statutory authority to use steam power when they only expect to obtain a consent which the statute requires.⁶³ Representations of this kind, which deliberately discount the future, seem to be of a different kind from statements honestly made on erroneous information of existing facts; for they are in their nature incompatible with belief in the truth of the assertion which is actually made. This distinction is not always clearly brought out in the authorities.

The application of the doctrine of fraud to sales by auction is

takes upon himself to warrant his own belief of the truth of that which he so asserts." In *Lehigh Zinc and Iron Co. v. Bamford* (1893) 150 U. S. 665, 673, the Supreme Court of the United States approved a statement of the Court below which was, "in substance, that a person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations to one who believes and acts upon them as if he had actual knowledge of their falsity; that deceit may also be predicated of a vendor or lessor who makes material untrue representations in respect to his own business or property for the purpose of their being acted upon, and which are in fact relied upon by the purchaser or lessee, the truth of which representations the vendor or lessor is bound and must be presumed to know." [Cf. Williston, *Contracts*, § 1509. American law with respect to the equation of negligent misstatement to fraud is apparently not uniform throughout the States, but the learned author states that "there is an increasing tendency to impose liability upon one whose false statements, although innocently made, have induced another to act to his detriment." *Derry v. Peek*, note ⁶⁰, has settled it in English law that a negligent representation cannot amount to fraud or deceit; whether it can amount to the tort of negligence is an open point: Winfield, *Text-book of Tort*, § 116.]

⁵⁸ *Owen v. Homan* (1853) 4 H. L. C. at 1035; 94 R. R. 530.

⁵⁹ *Rawlins v. Wickham* (1858) 3 De G. & J. at 313; *Smith's case* (1867) L. R. 2 Ch. at 611.

⁶⁰ *Derry v. Peek* (1889) 14 App. Ca. 337; 58 L. J. Ch. 864. As to the criterion of reasonable belief, see *Adams v. Thrift* [1915] 2 Ch. 21; 84 L. J. Ch. 729, C. A.

⁶¹ *Peek v. Gurney* (1873) L. R. 6 H. L. 377, 390, 403; 43 L. J. Ch. 19. [The American Restatement of Contracts, § 472 (b), is to the like effect.]

⁶² *Polhill v. Walter* (1832) 3 B. & Ad. 114; 37 R. R. 344.

⁶³ *Derry v. Peek*, *supra*.

peculiar. The courts of law held the employment of a puffer to bid on behalf of the vendor to be evidence of fraud in the absence of any express condition fixing a reserve price or reserving a right of bidding; for such a practice is inconsistent with the terms on which a sale by auction is assumed to proceed, namely that the highest bidder is to be the purchaser, and is a device to put an artificial value on the thing offered for sale.⁶⁴ There existed, or was supposed to exist,⁶⁵ in courts of equity the different rule that the employment of one puffer to prevent a sale at an undervalue was justifiable,⁶⁶ with the extraordinary result that in this particular case a contract might be valid in equity which a court of law would treat as voidable on the ground of fraud. The Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), assimilated the rule of equity to that of law.⁶⁷ [The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 58, sub-s. (2), has a similar provision with respect to sale by auction of goods.⁶⁸]

Marriage is to some extent an exception to the general rule: but marriage, though including a contract, is so much more than a contract that the exception is hardly a real one. The English rule is that "unless the party imposed upon has been deceived as to the person and thus has given no consent at all [or is otherwise incapable of giving an intelligent consent], there is no degree of deception which can avail to set aside a contract of marriage knowingly⁶⁹ made."⁷⁰ Still less is a marriage rendered invalid by the parties or one of them having practised a fraud on the persons who performed the ceremony or the authorities of the State in whose jurisdiction it was performed. Where a marriage had been celebrated in due form by Roman ecclesiastics at Rome between two Protestants, who had previously made a formal abjuration (the marriage not being otherwise possible by the law of the place as it then was), it was held immaterial whether the abjuration had been sincere or not, though as to the woman there was strong evidence to show that it was not.⁷¹

⁶⁴ *Green v. Baverstock* (1863) 14 C. B. N. S. 204; 32 L. J. C. P. 181; 135 R. R. 657.

⁶⁵ Doubt was thrown upon it in *Mortimer v. Bell* (1865) L. R. 1 Ch. 10, 16; 35 L. J. Ch. 25.

⁶⁶ *Smith v. Clarke* (1806) 12 Ves. 477, 483; 8 R. R. 359, 363; *Flint v. Woodin* (1852) 9 Ha. 618; 89 R. R. 602.

⁶⁷ The Indian Contract Act, s. 123 (now Indian Sale of Goods Act, 1930, s. 64 (6)), adopted the rule of the common law some years later. The use of the word "reserve" is not necessary to satisfy the requirement of the Act as to the notice to be given. Any clear indication that the sale is subject to a reserve will do: *Hills and Grant, Ltd. v. Hodson* [1934] 1 Ch. 53; 103 L. J. Ch. 17.

⁶⁸ [So, too, the American Uniform Sales Act. In the United States, the distinction between law and equity on this point never existed: Williston, *Contracts*, § 1664.]

⁶⁹ A ceremony of marriage may be inoperative if the woman is tricked into it by representations that it is not a marriage but a betrothal; though in this country such a case must obviously be very rare: *Ford v. Stier* [1896] P. 1; 65 L. J. P. 13. Here there is no such knowledge as is required for real consent.

⁷⁰ *Swift v. Kelly* (1835) 3 Knapp. 257, 293; 40 R. R. 22, 48; *Moss v. Moss* [1897] P. 263; 66 L. J. P. 154; [*Hussein v. Hussein* [1938] P. 159; 107 L. J. P. 105]; and as to the different views held in America and elsewhere, see [1897] P. 273 *seq.*

⁷¹ *Swift v. Kelly* (1835) 3 Knapp. 257; 40 R. R. 22.

We may observe in this place that when the consent of a third party is required to give complete effect to a transaction between others, that consent may be voidable if procured by fraud, and the same rules are applied, so far as applicable, which determine the like questions as between contracting parties. Thus where the approval of the directors is necessary for the transfer of shares in a company, a false description of the transferee's condition, such as naming him "gentleman" when he is a servant or messenger, or a false statement of a consideration paid by him for the shares, when in truth he paid nothing or was paid to execute the transfer, is a fraud upon the directors, the object being to mislead them by the false suggestion of a real purchase of the shares by a man of independent position; and on a winding-up the Court will replace the transferor's name on the register for the purpose of making him a contributory.⁷²

⁷² *Ex parte Kintrea* (1869) L. R. 5 Ch. 95; 39 L. J. Ch. 193; *Payne's case* (1869) and *Williams' case* (1869) L. R. 9 Eq. 233.

11

THE RIGHT OF RESCISSION

We have now to examine those conditions which apply indifferently, or very nearly so, to all cases where a contract is voidable for misrepresentation with or without deceit. Some of them, indeed, extend to all contracts which are or have become voidable for any cause whatever.

Stated in the broadest manner, they are as follows:—A representation relied on as ground for rescinding a contract must be contrary to fact, not a mere expression of opinion; it must be such as to induce the contract; it must proceed from a party to the contract, and be part of the same transaction. Further, when all these conditions are satisfied it has to be considered what are the rights of the party misled.

We will deal with these matters in the order named.

A. It must (except, it seems, in a case of actual fraud) be a representation of fact, as distinguished on the one hand from matter of law, and on the other hand from a matter of mere opinion or intention.

As to the first branch of the distinction, there is authority at common law that a misrepresentation of the legal effect of an instrument by one of the parties to it does not enable the other to avoid it.¹ And in equity there is no reason to suppose that the rule is otherwise, though the authorities only go to this extent, that no independent liability can arise from a misrepresentation of what is purely matter of law.² Note however that a representation as to the effect of an existing instrument may estop the party making it from setting up any other construction.³ The rule probably does not apply to a deliberately fraudulent mis-statement of the law.⁴ The circumstances and the position of the parties may well be such as to make it not imprudent or unreasonable for the person to whom the statement was made to rely on the knowledge of the person making it: and it would certainly work injustice if it were held necessary to apply to such a case the maxim that every one is presumed to know the law. The reason of the thing seems to be that in ordinary cases the law is equally accessible to both parties, and statements about it are equally verifiable by

¹ *Lewis v. Jones* (1825) 4 B. & C. 506; 28 R. R. 360. Not so if the actual contents or nature of the instrument are misrepresented, as we saw in Ch. 9.

² *Rashdall v. Ford* (1866) L. R. 2 Eq. 750; 35 L. J. Ch. 769; *Beattie v. Lord Ebury* (1872) L. R. 7 Ch. 777, 802; L. R. 7 H. L. 102, 130; 41 L. J. Ch. 804; 44 *ib.* 20 (the House of Lords held there was no misrepresentation at all).

³ *De Tchihatchef v. Salerni Coupling* [1932] 1 Ch. 330; 101 L. J. Ch. 209. Such an assertion is not a mere expression of opinion. It amounts to saying: "This is the construction to govern the business."

⁴ *Hirschfield v. London, Brighton and South Coast Ry. Co.* (1876) 2 Q. B. D. 1; 46 L. J. Q. B. 1; *Bowen L. J.* in *West London Commercial Bank v. Kitson* (1884) 13 Q. B. Div. at 363.

both, or else are in the region of mere opinion. But there is no need to extend this to exceptional cases. At all events the rule applies only to pure propositions of law. The existence and actual contents of e.g., a private Act of Parliament are as much matters of fact as any other concrete facts.

As to the second branch, we may put aside the cases already mentioned in which the substance of the fraud is not misrepresentation, but a wrongful intention going to the whole matter of the contract. Apart from these it appears to be the rule that a false representation of motive or intention, not amounting to or including an assertion of existing facts, is inoperative. "It is always necessary to distinguish, when an alleged ground of false representation is set up, between a representation of an existing fact which is untrue and a promise to do something in future."⁶ On this ground was put the decision in *Vernon v. Keys*,⁷ where the defendant bought a business on behalf of a partnership firm. The price was fixed at 4,500*l.* on his statement that his partners would not give more: a statement afterwards shown to be false by the fact that he charged them in account with a greater price and kept the resulting difference in their shares of the purchase-money for himself. It was held that the vendor could not maintain an action of deceit, as the statement amounted only to giving a false reason for not offering a higher price. The case also illustrates the principle that collateral fraud practised by or against a third person does not avoid a contract. Here there was fraud, and of a gross kind, as between the buyer and his partners; but we must dismiss this from consideration in order to form a correct estimate of the decision as between the buyer and seller. It must be judged of as if the buyer had communicated the whole thing to his partners and charged them only with the price really given. Still the decision can hardly be supported unless on the ground of failure to prove damage. For the buyer was the agent of the firm, and in substance made a wilfully false statement as to the extent of his authority.

The Judicial Committee has held that it is clearly fraudulent for A. and B. to combine to sell property in B.'s name, B. not being in truth the owner but only an intermediate agent, and the nominal price not being the real price to be paid to the owner A., but including a commission to be retained by B.⁸ And under

⁶ Bowen, L. J. *ubi sup.* ⁷ Mellish L. J. *Ex parte Burrell* (1876) 1 Ch. Div. at 552.

⁷ (1810) 12 East, 632, in Ex. Ch. 4 Taunt, 488; 11 R. R. 499. The language used in the Ex. Ch. to the effect that the buyer's liberty must be co-extensive with the seller's, which is to "tell every falsehood he can do to induce a buyer to purchase," is of course not to be literally accepted.

⁸ *Lindsay Petroleum Co. v. Hurd* (1874) L. R. 5 P. C. 221, 243. This cannot actually overrule the reasons given for the decision in *Vernon v. Keys*; for decisions of the Judicial Committee, though they carry great weight, are not binding in English Courts: see *Leask v. Scott* (1877) 2 Q. B. Div. 376; 46 L. J. Q. B. 576, where the C. A. refused to follow the Judicial Committee; *Smith v. Brown* (1871) L. R. 6 Q. B. at 736; 40 L. J. Q. B. 214; *Janvier v. Sweeney* ([1919] 2 K. B. 316 88 L. J. Q. B. 1231, C. A.)

particular conditions a statement of intention, such as the purpose to which a proposed loan is intended to be applied, may be a material statement of fact.⁹ On principle A.'s existing intention seems to be as much a fact for B. as anything else.

It needs no authority to show that a statement of what is merely matter of opinion cannot bind the person making it as if he had warranted its correctness. And it is said that if a man makes assertions, as of matter of fact within his own knowledge, concerning that which is by its nature only matter of more or less probable repute and opinion, he is not legally answerable as for a deceit if the assertion turns out to be false.¹⁰ But it seems doubtful if this could be upheld at the present day. For surely the affirmation of a thing as within my own knowledge implies the affirmation that I have peculiar means of knowledge: and if I have not such means, then my statement is false and I shall justly be held answerable for it, unless indeed the special knowledge thus claimed is of a kind manifestly incredible.

Statements which in themselves are ambiguous cannot be treated as fraudulent merely because they are false in some one of their possible senses. In such a case the party who complains of having been misled must satisfy the Court that he understood and acted on the statement in the sense in which it was false.¹¹

B. The representation must be such as to induce the contract (*dans locum contractui*).¹²

Relief cannot be given on the ground of fraud or misrepresentation to a party who has in fact not acted on the statements of the other, but has taken steps of his own to verify them, and has acted on the judgment thus formed by himself.¹³

"The Court must be careful that in its anxiety to correct frauds it does not enable persons who have joined with others in speculations to convert their speculations into certainties at the expense of those with whom they have joined."¹⁴

It is not perfectly free from doubt whether in any, and if in any, in what cases the possession of means of knowledge which if used

⁹ *Edgington v. Fitzmaurice* (1885) 29 Ch. Div. 459, 480, 483; 55 L. J. Ch. 650.

¹⁰ *Haycraft v. Creasy* (1801) 2 East, 92; 6 R. R. 380. Here the defendant had stated, as a fact within his own knowledge, that a person was solvent who appeared to have ample means, but turned out to be an impostor. The majority of the Court seem to have thought that the plaintiff must in the circumstances have known the defendant to be expressing only an opinion founded on that which appeared to all the world. So a statement of confident expectation of profits must be distinguished from an assertion as to profits actually made: *Bellairs v. Tucker* (1884) 13 Q. B. D. 562.

¹¹ *Smith v. Chadwick* (1884) 9 App. Ca. 187; 51 L. J. Ch. 597; see especially per Lord Blackburn at 199—201. The language used in *Hallows v. Fernie* (1868) L. R. 3 Ch. at 476, seems to go too far. Lord Blackburn leaves it as an unsettled question what would happen if the defendant could in turn prove the falsehood or ambiguity to be due to a mere blunder.

¹² Lord Brougham, *Attwood v. Small* (1835-8) 6 Cl. & F. 444; 49 R. R. 137; Lord Wensleydale, *Smith v. Kay* (1859) 7 H. L. C. 775-76; 115 R. R. 383.

¹³ See for a modern example, *Farrar v. Churchill* (1890) 135 U. S. 609.

¹⁴ *Jennings v. Broughton* (1853-4) 5 D. M. G. 126, 140; 22 L. J. Ch. 584; 99 R. R. 136; *Dyer v. Hargrave* (1805) 10 Ves. 505; 8 R. R. 36.

would lead to the discovery of the truth will bar the party of his remedy.

In the case of active misrepresentation it is no answer in proceedings either for damages or for setting aside the contract to say that the party complaining of the misrepresentation had the means of making inquiries. "In the case of *Dobell v. Stevens*" . . . which was an action for deceit in falsely representing the amount of the business done in a public-house, the purchaser was held to be entitled to recover damages, although the books were in the house, and he might have had access to them if he had thought proper."¹⁵ The rule was the same in the Court of Chancery. It was said of a purchaser to whom the state of the property he bought was misrepresented:—"Admitting that he might by minute examination make that discovery, he was not driven to that examination, the other party having taken upon him to make a representation. . . . The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe."¹⁶ The principle is that "No man can complain that another has too implicitly relied on the truth of what he has himself stated."¹⁷ And it is not enough to show that the party misled did make *some* examination on his own account; proof of cursory or ineffectual inquiries will not do." In order to bar him of his remedy, it must be shown either that he knew the true state of the facts, or that he did not rely on the facts as represented."¹⁸

In 1867 the same principle was affirmed in the House of Lords.¹⁹ The suit was instituted by a shareholder in a railway company to be relieved from his contract on the ground of misrepresentations contained in the prospectus. Here it was contended that the prospectus referred the intending shareholder to other documents, and offered means of further information: besides, the memorandum and articles of association (and of these at all events he was bound to take notice) sufficiently corrected the errors and omissions of the prospectus. But the objection is thus answered:—

"When once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You at least, who have stated what is untrue, or have concealed the truth for the purpose of drawing

¹⁵ (1825) 3 B. & C. 623; 27 R. R. 441.

¹⁶ Per Lord Chelmsford, L. R. 2 H. L. 121.

¹⁷ *Dyer v. Hargrave* (1805) 10 Ves. at 509; 8 R. R. at 39.

¹⁸ *Reynell v. Sprye* (1852) 1 D. M. G. at 710; 91 R. R. 266; *Price v. Macaulay* (1852) 2 D. M. G. 339, 346; 95 R. R. 129, 134.

¹⁹ *Redgrave v. Hurd* (1881) 20 Ch. Div. 1; 51 L. J. Ch. 113.

²⁰ *Redgrave v. Hurd* (1881) 20 Ch. Div. 1, 21 (Jessel M.R.).

²¹ *Central Ry. Co. of Venezuela v. Kisch* (1867) L. R. 2 H. L. 99, 120; 36 L. J. Ch. 849 (Lord Chelmsford). As to the earlier and indecisive case of *Attwood v. Small* (1835-6) 6 Cl. & F. 232; 49 R. R. 115, see now *Redgrave v. Hurd* (1881) 20 Ch. Div. at 14; 51 L. J. Ch. 113.

me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.' ”

This doctrine appears, on the same authority, not to apply to the case of mere non-disclosure, without fraudulent intention, of a fact which ought to have been disclosed.

“When the fact is not misrepresented but concealed [or rather not communicated]²² and there is nothing done to induce the other party not to avail himself of the means of knowledge within his reach, if he neglects to do so he may have no right to complain, because his ignorance of the fact is attributable to his own negligence.”²³

It appears also not to apply to a mere assertion of title by a vendor of land.²⁴

In a case before Lord Hatherley, when V.-C., the double question arose of the one party's knowledge that his statement was untrue, and of the other's means of learning the truth. The suit was for specific performance of an agreement to take a lease of a limestone quarry. The plaintiff made a distinct representation as to the quality of the limestone which was in fact untrue: he did not believe it to be false, but he had taken no pains to ascertain, as he might easily have done, whether it was true or not. But then the defendant had not relied exclusively upon this statement, for he went to look at the stone; still he was not a limeburner by trade, and could not be supposed to have trusted merely to what he saw, being in fact not competent to judge of the quality of limestone. The result was that the Court refused specific performance, declining to decide whether the contract was otherwise valid or not.²⁵

The case of *Horsfall v. Thomas*²⁶ was decided on the same principle: there a contrivance was used to conceal a defect in a gun manufactured to a purchaser's order, but the purchaser took it without any inspection, and therefore, although the vendor intended to deceive him, had not been in fact deceived.

It might also be given as a rule that the representation must be material. But to make this quite accurate it should be stated in the converse form, namely that a material representation may be presumed to have in fact induced the contract; for a man who has obtained a contract by false representations cannot afterwards be heard to say that those representations were not material. The excuse has often been put forward that for anything that appeared the other party might no less have given his consent if the truth

²² *Oakes v. Turquand* (1867) L. R. 2 H. L. at p. 339.

²³ *New Brunswick, &c. Co. v. Corybeare* (1862) 9 H. L. C. 711, 742; 31 L. J. Ch. 297; 131 R. R. 415.

²⁴ *Hume v. Pocock* (1866) L. R. 1 Ch. 379, 385; 35 L. J. Ch. 731, where however the real contract was to buy up a particular claim of title, whatever it might be worth.

²⁵ *Higgins v. Samels* (1862) 2 J. & H. 460, 468, 469; 134 R. R. 304.

²⁶ (1862) 1 H. & C. 90; 31 L. J. Ex. 322; 130 R. R. 394, dissented from by Cockburn C.J. *Smith v. Hughes* (1871) L. R. 6 Q. B. at 605; but it seems good law.

had been made known to him, and the Court has always been swift to reject it. When a falsehood is proved, the Court does not require positive evidence that it was successful;²⁷ it rather presumes that assent would not have been given if the facts had been known.²⁸ Those who have made false statements cannot ask the Court to speculate on the exact share they may have had in inducing the transaction;²⁹ or on what might have been the result if there had been a full communication of the truth;³⁰ it is enough that an untrue statement has been made which was likely to induce the party to enter into a contract, and that he has done so.³¹ Special circumstances may make a representation material which in ordinary cases of the same kind of contract would not be. If a moneylender who has become notorious for harsh and oppressive dealing attracts a borrower by advertising in an assumed name, a jury may find that the contract was fraudulent.³² An inference or presumption of this class is of fact, not of law, and is open to contradiction like other inferences of fact.³³

In like manner, if there has been an omission even without fraud to communicate something which ought to have been communicated, it is too late to discuss whether the communication of it would probably have made any difference.³⁴

If it be asked in general terms what is a material fact, we may answer, by an extension of the language adopted by the Queen's Bench in a case of marine insurance,³⁵ that it is anything which would affect the judgment of a reasonable man governing himself by the principles on which men in practice act in the kind of business in hand.

There is an exception, but only an apparent one, to the rule that the representation must be the cause of the other party's contracting. A contract arising directly out of a previous transaction between the same parties which was voidable on the ground of fraud is itself in like manner voidable. A. makes a contract with B., with the fraudulent intention of making it impossible by a secret scheme for B. to perform the contract. B. ultimately agrees to pay and does pay to A. a sum of money to be released from the contract: if he afterwards discovers the scheme B. can rescind this last agreement and recover the money back.³⁶

²⁷ *Williams' case* (1869) L. R. 9 Eq. 225, n.

²⁸ *Ex parte Kintrea* (1869) L. R. 5 Ch. at 101; 39 L. J. Ch. 193.

²⁹ *Reynell v. Sprye* (1852) 1 D. M. G. at 708; 91 R. R. 265.

³⁰ *Smith v. Kay* (1859) 7 H. L. C. at 759.

³¹ *Per Lord Denman C.J. Watson v. Earl of Charlemont* (1848) 12 Q. B. 856, 864; 18 L. J. Q. B. 65 To the like effect, *Jessel M.R. in Smith v. Chadwick* (1884) 20 Ch. Div. at 44 (see however note ³³).

³² *Gordon v. Street* [1899] 2 Q. B. 641; 69 L. J. Q. B. 45, C. A.

³³ *Lord Blackburn, Smith v. Chadwick* (1884) 9 App. Ca. at 196.

³⁴ *Trill v. Baring* (1864) 4 D. J. S. at 330. [Applied in *With v. O'Flanagan* [1936] Ch. 575; 105 L. J. Ch. 247; p. 423, note ²⁶.]

³⁵ *Ionides v. Pender* (1874) L. R. 9 Q. B. 531; 43 L. J. Q. B. 227, p. 425.

³⁶ *Barry v. Croskey* (1861) 2 J. & H. 1; 134 R. R. 91.

"If the promoter of a company procures a company to be formed by improper and fraudulent means, and for the purpose of securing a profit to himself, which, if the company was successful, it would be unjust and inequitable to allow him to retain [in the particular case a secret payment to the promoter out of purchase-money], and the company proves abortive and is ordered to be wound up without doing any business, the promoter cannot be allowed to prove against the company in the winding-up, either in respect of his services in forming the company, or in respect of his services as an officer of the company after the company was registered."³⁷

So it is where the parties really interested, though not the nominal parties, are the same. Thus where a sale of goods is procured by fraud, and the vendors forward the goods by railway to the purchaser's agent, and afterwards reclaim them, indemnifying the railway company, these facts constitute a good defence to an action by the purchaser's agent against the railway company, though the re-delivery to the vendors was before the discovery of the fraud and arose out of an unsuccessful attempt to stop the goods *in transitu*.³⁸

C. The representation must be made by a party to the contract. This rule in its simple form is elementary. It is obvious that A. cannot be allowed to rescind his contract with B. because he has been induced to enter into it by some fraud of C. to which B. is no party.³⁹ Thus in *Sturge v. Starr*⁴⁰ a woman joined with her supposed husband in dealing with her interest in a fund. The marriage was in fact void, the man having concealed from her a previous marriage. It was held that this did not affect the rights of the purchaser.

When we come to deal with contracts made by agents the question arises to what extent the representations of the agent are to be considered as the representations of the agent are to be considered as the representations of the principal for the purposes of this rule. And this question, though now practically set at rest by recent decisions, is one which has given rise to some difficulty. A false statement made by an agent with his principal's express authority, the principal knowing it to be false, is obviously equivalent to a falsehood told by the principal himself; nor can it make any difference as against the principal whether the agent knows the statement to be false or not. But we may also have the following cases. The statement may be not expressly authorised by the principal, nor known to be untrue by him, but known to be

³⁷ Per Cur. In re Hereford and S. Wales Waggon and Engineering Co. (1876) 2 Ch. Div. 621, 626—627; 45 L. J. Ch. 461. It must not be assumed that the company would be liable in the absence of fraud: see *English and Colonial Produce Co.'s case* [1906] 2 Ch. 435; 75 L. J. Ch. 831; 95 L. T. 580, C. A.

³⁸ *Clough v. L. & N. W. Ry. Co.* (1871) (Ex. Ch.) L. R. 7 Ex. 26; 41 L. J. Ex. 17, an exceedingly instructive case (see further, p. 470). As to the misconceived act being justified by reference to the true ground of rescission afterwards discovered, cp. *Wright's case* (1871) L. R. 7 Ch. 55; 41 L. J. Ch. 1.

³⁹ See per Lord Cairns, *Smith's case*, L. R. 2 Ch. at 616.

⁴⁰ (1893) 2 My. & K. 195; cp. *Wheaton v. Hardisty* (1857) 8 E. & B. 232, 26 L. J. Q. B. 265; 27 ib. 241; 112 R. R. 535.

untrue by the agent; or conversely, the statement may be not known to the agent to be untrue, and not expressly authorised by the principal, the true state of the facts being, however, known to the principal. There is no doubt that in the first case the principal is answerable, subject only to the limitation to be presently stated.⁴¹ In the second case there is every reason to believe that the same rule holds good, notwithstanding a much canvassed decision to the contrary,⁴² which, if not overruled by the remarks since made upon it,⁴³ has been cut down to a decision on a point of pleading which perhaps cannot, and certainly need not, ever arise again.

These distinctions have to be considered only when there is a question of fraud in the strict sense, and then chiefly when it is sought to make the principal liable in damages. Where a non-fraudulent misrepresentation suffices to avoid the contract, there it is clear that the only thing to be ascertained is whether the representation was in fact within the scope of the agent's authority.⁴⁴ And it is now accepted as the law that this is the only question even in a case of fraud. It was laid down by a considered judgment of the Exchequer Chamber,⁴⁵ fully approved by later decisions of the Judicial Committee,⁴⁶ that "the master is answerable for every such wrong," including fraud, "of the servant or agent as is committed in the course of the service and for the master's benefit," though no express command or privity of the master be proved." Although the master may not have authorized the particular act, yet if "he has put the agent in his place to do that class of acts," he must be answerable for the agent's conduct. It makes no difference whether the principal is a natural person or a corporation.⁴⁷ In two of the cases just referred to a banking corporation was held liable for a false representation made by one of its officers in the course of the business usually conducted by him on behalf of the bank; and this involves the proposition that

⁴¹ The rule applies to an agent who profits by the fraud of a sub-agent employed by him : *Cockburn C.J.* in *Weir v. Bell* (1878) 3 Ex. D. at 249.

⁴² *Cornfoot v. Fowke* (1840) 6 M. & W. 358 ; 55 R. R. 655.

⁴³ 2 Sm. L. C. 90—92, 13th ed. ; and see especially per Willes J. in *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Ex. 262. [In *London County Freehold, &c. Properties, Ltd. v. Berkeley, &c. Co., Ltd.* (1936) 155 L. T. 190, Slesser and Romer L.JJ. regarded *Cornfoot v. Fowke* as no longer law. See the full discussion of the topic by P. A. Devlin in 53 L. Q. R. (1937) 344—363.]

⁴⁴ [On non-fraudulent misrepresentation, see *Anglo-Scottish, &c. Corporation v. Spalding U.D.C.* [1937] 2 K. B. 607 ; 106 L. J. K. B. 885.]

⁴⁵ *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Ex. 259 ; 36 L. J. Ex. 147.

⁴⁶ *Mackay v. Commercial Bank of New Brunswick* (1874) L. R. 5 P. C. 394, 411 ; 43 L. J. P. C. 31 ; *Sure v. Francis* (1877) 3 App. Ca. 106 ; 47 L. J. P. C. 18.

⁴⁷ This does not exclude the liability of a principal for the act of an agent who has abused his authority for his own purposes in a transaction of an authorized class : *Lloyd v. Grace Smith & Co.* [1912] A. C. 716 ; 81 L. J. K. B. 1140 ; [*Uxbridge Permanent Building Society v. Pickard* [1939] 2 K. B. 248 ; 108 L. J. K. B. 757].

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⁴⁰ (1833) 2 My. & K. 195; cp. *Wheelton v. Hardisty* (1857) 8 E. & B. 232, 26 L. J. Q. B. 265; 27 ib. 241; 112 R. R. 535.

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These distinctions have to be considered only when there is a question of fraud in the strict sense, and then chiefly when it is sought to make the principal liable in damages. Where a non-fraudulent misrepresentation suffices to avoid the contract, there it is clear that the only thing to be ascertained is whether the representation was in fact within the scope of the agent's authority.⁴⁴ And it is now accepted as the law that this is the only question even in a case of fraud. It was laid down by a considered judgment of the Exchequer Chamber,⁴⁵ fully approved by later decisions of the Judicial Committee,⁴⁶ that "the master is answerable for every such wrong," including fraud, "of the servant or agent as is committed in the course of the service and for the master's benefit," though no express command or privity of the master be proved." Although the master may not have authorized the particular act, yet if "he has put the agent in his place to do that class of acts," he must be answerable for the agent's conduct. It makes no difference whether the principal is a natural person or a corporation.⁴⁷ In two of the cases just referred to a banking corporation was held liable for a false representation made by one of its officers in the course of the business usually conducted by him on behalf of the bank; and this involves the proposition that

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the party misled is entitled to rescind the contract induced by such representation. [The corporation is liable even if the elements of fraud have to be collected from several of its agents, for a diffusion of responsibility among such agents is not to be regarded as a dilution of the responsibility of the corporation itself.⁴⁹]

The directors and other officers of companies, acting within the functions of their offices, are for this purpose agents, and the companies are bound by their acts and conduct. Conversely, where directors employ an agent for the purposes of the company, and that agent commits a fraud in the course of his employment without the personal knowledge or sanction of the directors, the remedy of persons injured by the fraud is not against the directors, who are themselves only agents, but against the company as ultimate principal:⁵⁰ and one director is not liable for fraud committed by another director without his authority or concurrence.⁵¹ Reports made in the first instance to a company by its directors, if afterwards adopted by a meeting and "industriously circulated," must be treated as the representations of the company to the public, and as such will bind it.⁵² Statements in a prospectus issued by promoters before the company is in existence cannot indeed be said with accuracy to be made by agents for the company: for one cannot be an agent even by subsequent ratification for a principal not in existence and capable of ratifying at the time.⁵³ But such statements also, if afterwards expressly or tacitly adopted, become the statements of the company. It is a principle of general application, by no means confined to these cases that if A. makes an assertion to B., and B. repeats it to C. in an unqualified manner, intending him to act upon it, and C. does act upon it, B. makes that assertion his own and is answerable for its consequences. If he would guard himself, it is easy for him to say: "This is what A. tells me, and on his authority I repeat it; for my own part I believe it, but if you want any further assurance it is to him you must look."⁵⁴

It is to be borne in mind that in a case of actual fraud on the part of an agent the responsibility of the principal does not in any way exclude the responsibility of the agent. "All persons

⁴⁹ [*London County Freehold, &c. Properties, Ltd. v. Berkeley, &c. Co., Ltd.* (1936) 155 L. T. 190. Cf. *Anglo-Scottish Beet Sugar Corporation v. Spalding U.D.C.* [1937] 2 K. B. 607; 106 L. J. K. B. 885.]

⁵⁰ *Weir v. Barnett* (1877) 3 Ex. D. 32, affd. in C. A. *nom. Weir v. Bell* (1878) *ib.* 238; 47 L. J. Ex. 704. But a director who profited by the fraud after knowledge of it would probably be liable: see judgments of Cockburn C.J. and Brett L.J. And directors who delegated their office without authority, so that their delegate did not become the company's agent, would be liable: see the dissenting judgment of Cotton L.J., who took this view of the facts.

⁵¹ *Cargill v. Bower* (1878) 10 Ch. D. 502; 47 L. J. Ch. 649.

⁵² Per Lord Westbury, *New Brunswick, &c. Co. v. Conybeare* (1862) 9 H. L. C. 711, 725; 31 L. J. Ch. 297; 131 R. R. 415. See further, as to what must be shown to bind a company in respect of misrepresentations including a person to take shares, *Lynde v. Anglo-Italian Hemp Spinning Co.* [1896] 1 Ch. 178; 65 L. J. Ch. 96.

⁵³ P. 88.

⁵⁴ *Smith's case* (1867) L. R. 2 Ch. 604, 611; p. 440.

directly concerned in the commission of a fraud are to be treated as principals"; and in this sense it is true that an agent or servant cannot be authorized to commit a fraud. He cannot excuse himself on the ground that he acted only as agent or servant."

D. The representation must be made as part of the same transaction.

It is believed that the statement of the rule in this form, though at first sight vague, is really more accurate than that which presents itself as an alternative, but is in fact included in this—namely, that the representation must be made to the other party or with a view to his acting upon it. The effect of the rule is that the untruth of a representation made to a third person, or even to the party himself on some former occasion, in the course of a different transaction and for a different purpose, cannot be relied on as a ground either for rescinding a contract or for maintaining an action of deceit. Thus in *Western Bank of Scotland v. Addie*⁶⁵ the directors of the bank had made a series of flourishing but untrue reports on the condition of its affairs, in which bad debts were counted as good assets. The shareholder who sought relief in the action had taken additional shares on the faith, as he said, of these reports. But it was not shown that they were issued or circulated for the purpose of inducing existing shareholders to take more shares, or that the local agent of the bank who effected this particular sale of shares used them or was authorized to use them for that purpose. Thus the case rested only on the purchaser having acted under an impression derived from these reports at some former time; and that was not such a direct connexion between the false representation and the conduct induced by it as must be shown in order to rescind a contract.⁶⁷

In *Peek v. Gurney*⁶⁸ the important point is decided that the sole office of a prospectus is to invite the public to take shares in the company in the first instance. Those who take shares in reliance on the prospectus are entitled to their remedy if the statements in it are false. But those statements cannot be taken as addressed to all persons who may hereafter become purchasers of shares in the market, and such persons cannot claim any relief on the ground of having been deceived by the prospectus unless they can show that it was specially communicated to them by some further act on the part of the company or the directors. Some

⁶⁵ Per Lord Westbury, *Cullen v. Thomson's Trustees and Kerr* (1862) 4 Macq. 424, 432; *Swift v. Winterbotham* (1873) L. R. 8 Q. B. 244, 254; 42 L. J. Q. B. 111.

⁶⁶ (1867) L. R. 1 Sc. 145.

⁶⁷ This was not the only ground of the decision; its main principle, as explained in a later case in the House of Lords, is that a person who remains a shareholder, either by having affirmed his contract with the company or by being too late to rescind it, cannot have a remedy in damages against the corporate body for representations on the faith of which his shares were taken: *Houldsworth v. City of Glasgow Bank* (1880) 5 App. Ca. 317; 43 L. J. Ch. 19.

⁶⁸ (1873) L. R. 6 H. L. 377, 395: and see the case put by Lord Cairns as an illustration at p. 411.

former decisions the other way⁵⁰ are expressly overruled. The proceeding there in hand was in the nature of an action of deceit, but the doctrine must equally apply to the rescission of a contract. It is otherwise, however, if the prospectus is in fact used afterwards, at any rate in conjunction with other fraudulent statements, to induce people to buy shares in the market.⁵¹

In *Way v. Hearn*⁵¹ the action was on a promise by the defendant to indemnify the plaintiff against half of the loss he might sustain by having accepted a bill drawn by one R. Shortly before this, in the course of an investigation of R's affairs in which the defendant took part, R. had at the plaintiff's request concealed from the accountant employed in the matter the fact that he owed a large sum to the plaintiff; the plaintiff said his reason for this was that he did not wish his wife to know he had lent so much money upon bad security. At this time the bill which was the subject of the indemnity was not thought of; it was in fact given to get rid of an execution afterwards put in by another creditor. Here a misrepresentation as to R's solvency was made by R. in concert with the plaintiff, and communicated to the defendant; but it was in a transaction unconnected with the subsequent contract between the plaintiff and the defendant, and the defendant was therefore not entitled to dispute that contract on the ground of fraud.

E. As to the right of the party misled. This right is one which requires, and in several modern cases of importance has received, an exact limitation and definition. It may be thus described:

The party who has been induced to enter into a contract by fraud, or by concealment or misrepresentation in any matter such that the truth of the representation made, or the disclosure of the fact, is by law or by special agreement of the parties of the essence of the contract, may affirm the contract, and insist, if that is possible, on being put in the same position as if the representation had been true:

Or he may at his option rescind the contract,⁵² and claim to be restored, so far as may be, to his former position within a reasonable time⁵³ after discovering the misrepresentation, unless it has become impossible to restore the parties to the position in which they would have been if the contract had not been made, or unless

⁵⁰ *Bedford v. Bagshaw* (1859) 4 H. & N. 538; 29 L. J. Ex. 59; *Bagshaw v. Seymour* (1856) 18 C. B. 903; 29 L. J. Ex. 62, n. The authority of *Gerhard v. Bates* (1853) 2 E. & B. 476; 22 L. J. Q. B. 365; 95 R. R. 655, is saved by a rather fine distinction: L. R. 6 H. L. 399.

⁵¹ *Andrews v. Mockford* [1896] 1 Q. B. 372; 65 L. J. Q. B. 302, C. A.

⁵² (1862) 13 C. B. N. S. 292; 32 L. J. C. P. 34; 134 R. R. 538.

⁵³ [In *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt* [1941] 1 K. B. 295; 110 L. J. K. B. 375, C. A., an opinion was expressed that, whatever may be the law with regard to non-disclosure of material facts, the right to rescind a contract, whether of insurance or not, which has been induced by misrepresentation, does not depend on any implied term in the contract, but upon the jurisdiction originally exercised in Equity to prevent imposition.]

⁵⁴ But *qu.* whether time is in itself material: see L. R. 7 Ex. 35; 8 Ex. 205.

any third person has in good faith and for value acquired any interest under the contract.

It will be necessary to dwell separately on the several points involved in this. And it is to be observed that the principles here considered are not confined to any particular ground of rescission, but apply generally when a contract is voidable, either for fraud or on any other ground, at the option of one of the parties; on a sale of land, for example, it is constantly made a condition that the vendor may rescind if the purchaser takes any objection to the title which the vendor is unable to remove; and then these rules apply so far as the nature of the case admits.

1. NATURE OF THE RIGHT: WHAT IS AN AFFIRMATION OR RESCISSION

"A contract induced by fraud is not void, but voidable only at the option of the party defrauded"; in other words, valid until rescinded.⁶⁴

Where the nature of the case admits of it, the party misled may affirm the contract and insist on having the representation made good. If the owner of an estate sells it as unincumbered, concealing from the purchaser the existence of incumbrances, the purchaser may if he thinks fit call on him to perform his contract and redeem the incumbrances.⁶⁵ If promoters of a partnership undertaking induce persons to take part in it by untrue representation that a certain amount of capital has been already subscribed for, they will themselves be put on the list of contributories for that amount.⁶⁶

It is to be remembered that the right of election, and the possibility of having the contract performed with compensation, do not exclude the option of having the contract wholly set aside. "It is for the party defrauded to elect whether he will be bound."⁶⁷ But if he does affirm the contract, he must affirm it in all its terms. Thus a vendor who has been induced by fraud to sell goods on credit cannot sue on the contract for the price of the goods before the expiration of the credit: the proper course is to rescind the contract and sue in trover.⁶⁸ When the contract is once affirmed, the election is completely determined; and for this purpose it is not necessary that the affirmation should be express. Any acts or conduct which unequivocally treat the contract as subsisting, after the facts giving the right to rescind have come to the knowledge of the party, will have the same effect.⁶⁹ Taking steps to enforce

⁶⁴ *Oakes v. Turquand* (1857) L. R. 2 H. L. 346, 375, 376.

⁶⁵ *Per Romilly M.R. in Fulford v. Richards* (1853) 17 Beav. 96; 22 L. J. Ch. 559; 99 R. R. 54. Cp. *Ungley v. Ungley* (1877) 5 Ch. Div. 887; 46 L. J. Ch. 854.

⁶⁶ *Moore and De la Torre's case* (1874) L. R. 18 Eq. 661; 43 L. J. Ch. 751.

⁶⁷ *Rawlins v. Wickham* (1858) 3 De G. & J. 304, 322; 28 L. J. Ch. 188; 121 R. R. 134.

⁶⁸ *Ferguson v. Carrington* (1829) 9 B. & C. 59. The form or formal cause of action is now immaterial in most jurisdictions, but the measure of damages may be different.

⁶⁹ *Clough v. L. & N. W. Ry. Co.* (1871) (Ex. Ch.) L. R. 7 Ex. at 34. That the affirmation must be complete and unequivocal, see *Abram S.S. Co. v. Westville Shipping Co.* [1923] A. C. 773.

the contract is a conclusive election not to rescind on account of anything known at the time.⁷⁰ [This principle is "You cannot be acting on the contract and assuming it to exist, and at the same time exercising a right to put an end to it by rescinding it"; and it is not limited to the right of rescission for fraud, but applies to rescission generally.⁷¹] A shareholder cannot repudiate his share on the ground of misrepresentations in the prospectus if he has paid a call without protest or received a dividend after he has had in his hands a report showing to a reader of ordinary intelligence that the statements of the prospectus were not true,⁷² or if after discovering the true state of things he has taken an active part in the affairs of the company,⁷³ or has affirmed his ownership of the shares by taking steps to sell them;⁷⁴ and in general a party who voluntarily acts upon a contract which is voidable at his option, having knowledge of all the facts, cannot afterwards repudiate it if it turns out to his disadvantage.⁷⁵ And when the right of repudiation has once been waived by acting upon the contract as subsisting with knowledge of facts establishing a case of fraud, the subsequent discovery of further acts constituting "a new incident in the fraud" cannot revive it.⁷⁶ The exercise of acts of ownership over property acquired under the contract precludes a subsequent repudiation, but not so much because it is evidence of an affirmative election as because it makes it impossible to replace the parties in their former position; a point to which we shall come presently.

When the acts done are of this kind it seems on principle immaterial whether there is knowledge of the true state of affairs or not, unless there were a continuing active concealment or misrepresentation practised with a view to prevent the party defrauded from discovering the truth and to induce him to act upon the contract; for then the affirmation itself would be as open to repudiation as the original transaction. Something like this occurs not unfrequently in cases of undue influence, as we shall see in the next chapter.

Omission to repudiate within a reasonable time is evidence, and may be conclusive evidence, of an election to affirm the contract; and this is in truth the only effect of lapse of time. Still it will be more convenient to consider this point separately afterwards.

If on the other hand the party elects to rescind, he is to manifest that election by distinctly communicating to the other party his

⁷⁰ *Gray v. Fowler* (1873) (Ex. Ch.) L. R. 8 Ex. 249, 280; 42 L. J. Ex. 161.

⁷¹ [*Public Trustee v. Pearlberg* [1940] 2 K. B. 1, 9, 18—19; 109 L. J. K. B. 597.]

⁷² *Scholey v. Central Ry. Co. of Venezuela* (1867-8) L. R. 9 Eq. 266, n.

⁷³ *Sharpley v. Louth and East Coast Ry. Co.* (1867) 2 Ch. Div. 663; 46 L. J. Ch. 259.

⁷⁴ *Ex parte Briggs* (1866) L. R. 1 Eq. 483; 35 L. J. Ch. 320; this however was a case not of misstated facts, but of material departure from the objects of the company as stated in the prospectus.

⁷⁵ *Ormes v. Beadel* (1860) 2 D. F. J. 333, 336; 30 L. J. Ch. 1; 128 R. R. 77.

⁷⁶ *Campbell v. Fleming* (1894) 1 A. & E. 40; 53 R. R. 194. This does not apply where a new and distinct cause of rescission arises: *Gray v. Fowler* (1873) L. R. 8 Ex. 249; 42 L. J. Ex. 161.

intention to reject the contract and claim no interest under it. One way of doing this is to institute proceedings to have the contract judicially set aside, and in that case the judicial rescission, when obtained, relates back to the date of the commencement of such proceedings.⁷⁷ Or if the other party is the first to sue on the contract, the rescission may be set up as a defence, and this is itself a sufficient act of rescission without any prior declaration of an intention to rescind.⁷⁸ For the purposes of pleading, the allegation that a contract was procured by fraud has been held to import the allegation that the party on discovering it disaffirmed the contract.⁷⁹ Where the rescission is not declared in judicial proceedings, no further rule can be laid down than that there should be "prompt repudiation and restitution as far as possible."⁸⁰ The communication need not be formal, provided it is a distinct and positive rejection of the contract, not a mere request or inquiry, which is not enough.⁸¹ But it seems that if notwithstanding an express repudiation the other party persists in treating the contract as in force, then judicial steps should be taken in order to make the rescission complete as against rights of third persons which may subsequently intervene. Especially this is the case as to repudiating shares in a company. The creditors of a company are entitled to rely on the register of shareholders for the time being, and therefore it is not enough for a shareholder to give notice to the company that he claims to repudiate. A stricter rule is applied than would follow from the ordinary rules of contract.⁸² "The rule is that the repudiating shareholder must not only repudiate but also get his name removed, or commence proceedings to have it removed, before the winding-up"; but this rule is subject to the qualification that if one repudiating shareholder takes proceedings the others will have the benefit of them, if, but only if, there is an agreement between them and the company that they shall stand or fall by the result of those proceedings, but not

⁷⁷ *Rosse River Silver Mining Co. v. Smith* (1869) L. R. 4 H. L. 73-5; 39 L. J. Ch. 849. As to shares in companies, see below.

⁷⁸ *Clough v. L. & N. W. Ry. Co.* (1871) (Ex. Ch.) L. R. 7 Ex. 36; 41 L. J. Ex. 17.

⁷⁹ *Dawes v. Harness* (1875) L. R. 10 C. P. 166; 44 L. J. C. P. 194. The earlier cases there cited, especially *Deposit Life Assurance Co. v. Ayscough* (1856) 6 E. & B. 761; 26 L. J. Q. B. 29; 106 R. R. 790, are not wholly consistent.

⁸⁰ Per Bramwell B. *Bulch-y-Plwm Lead Mining Co. v. Baynes* (1867) L. R. 2 Ex. 326; 36 L. J. Ex. 183 (not that repudiation alone is enough in the case of shares in a company, see below, and *First Nat. Rens. Co. v. Greenfield* [1921] 2 K. B. 260; 90 L. J. K. B. 617).

⁸¹ See *Ashley's case* (1870) L. R. 9 Eq. 263; 39 L. J. Ch. 354.

⁸² *Kent v. Freehold Land, &c. Co.* (1868) L. R. 3 Ch. 493; *Hare's case* (1869) L. R. 4 Ch. 503; *Re Scottish Petroleum Co.* (1883) 23 Ch. Div. 413. But if there are several repudiating shareholders in a like position, proceedings taken by one of them and treated by agreement with the company as representative will enure for the benefit of all: *Paul's case* (1867) L. R. 4 Ch. 497; 38 L. J. Ch. 318; *McNiell's case* (1870) L. R. 10 Eq. 503; 39 L. J. Ch. 822, apparently rests only on this ground: see review of cases per Baggallay L. J. 23 Ch. D. at 433.

⁸³ I.e. before the presentation of a winding-up petition on which an order is made: *Whiteley's case* [1899] 1 Ch. 770; 68 L. J. Ch. 365. Or before action at latest if he is sued for calls: *First Nat. &c. Co.'s case*, note ⁸⁰.

otherwise."⁸⁴ Where the original contract was made with an agent for the other party, communication of the rescission to that agent is sufficient, at all events before the principal is disclosed.⁸⁵ And where good grounds for rescission exist, and the contract is rescinded by mutual consent on other grounds, those grounds not being such as to give a right of rescission, and the agent's consent being in excess of his authority, yet the rescission stands good. There is nothing more that the party can do, and when he discovers the facts on which he might have sought rescission as a matter of right he is entitled to use them in support of what is already done. Where the first rescission was irregular in form, it would seem that it cannot be supported as against third persons whose interests were involved, but there is a decision to the contrary.⁸⁶

Inasmuch as the right of rescinding a voidable contract is alternative and co-extensive with the right of affirming it, it follows that a voidable contract may be avoided by or against the personal representatives of the contracting parties.⁸⁷ And further, as a contract for the sale of land is enforceable in equity by or against the heirs or devisees of the parties so it may be avoided by or against them where grounds of avoidance exist.⁸⁸

A party exercising his option to rescind is entitled to be restored so far as possible to his former position. This includes a right to be indemnified against obligations incurred under the contract, and in cases of fraud, but in such cases only,⁸⁹ the right may extend to liabilities which are natural consequences of the contract though not created by the contract itself.

2. CHANGE OF RELATIONS PRECLUDING RESCISSION

The contract cannot be rescinded after the position of the parties has been changed so that the former state of things cannot be restored.

This may happen in various ways. The party who made the misrepresentation in the first instance may have acted on the faith of the contract being valid in such a manner that a subsequent rescission would work irreparable injury to him. And here the rule applies, but with the important limitation, it seems, that he

⁸⁴ *Lindley L.J.* 23 Ch. D. at 437.

⁸⁵ *Maynard v. Eaton* (1874) L. R. 9 Ch. 414; 43 L. J. Ch. 641.

⁸⁶ *Wright's case* (1871) L. R. 7 Ch. 55; 41 L. J. Ch. 1; cp. *Clough v. L. & N. W. Ry. Co.*, p. 454. Doubtful by Lord Lindley in his book on Companies. (Directors purported *ultra vires* to cancel an allotment on other grounds than the misrepresentation.)

⁸⁷ Including assignees in bankruptcy: *Load v. Green* (1846) 15 M. & W. 216; 15 L. J. Ex. 113; 71 R. R. 627; *Donaldson v. Farwell* (1876) 93 U. S. 631.

⁸⁸ *Gresley v. Mauseley* (1861) 4 De G. & J. 78; 28 L. J. Ch. 620; 124 R. R. 164; and see cases cited in next chapter, *ad fin.*, and *Charter v. Trevelyan* (1844) 11 Cl. & F. 714; 65 R. R. 305, where the parties on both sides were ultimately representatives, and as to the defendants through more than one succession.

⁸⁹ *Whittington v. Seale-Hayne* (1900) 82 L. T. 59, per Farwell J. adopting *Bowen L.J.'s* opinion in *Newbigging v. Adam* (1886) 34 Ch. Div. 582; 56 L. J. Ch. 275.

must have so acted to the knowledge of the party misled and without protest from him, so that his conduct may be said to be induced by the other's delay in repudiating the contract. Thus where a policy of marine insurance is voidable for the non-disclosure of a material fact, but the delay of the underwriters in repudiating the insurance after they know the fact induces the assured to believe that they do not intend to dispute it, and he consequently abstains from effecting any other insurance, it would probably be held that it is then too late for the underwriters to rescind.⁹⁰ Or the interest taken under the contract by the party misled may have been so dealt with that he cannot give back the same thing he received. On this principle a shareholder cannot repudiate his shares if the character and constitution of the company have in the meantime been altered. This was the case in *Clarke v. Dickson*,⁹¹ where the plaintiff had shares in a cost-book mining company. The company was afterwards registered under the Joint Stock Companies Act then in force, apparently for the sole purpose of being wound up. In the course of the winding-up the plaintiff discovered that fraudulent misrepresentations had been made by the directors. But it was by this time impossible for him to return what he had got; for instead of shares in a going concern on the cost-book principle he had shares in a limited liability company which was being wound up.⁹² It was held that it was too late to repudiate the shares, and his only remedy was by an action of deceit against the directors personally responsible for the false statements.⁹³ As Crompton J. put it, "You cannot both eat your cake and return your cake."⁹⁴ A similar case on this point is *Western Bank of Scotland v. Addie*.⁹⁵ There the company was an unincorporated joint stock banking company when the respondent took his shares in it. As in *Clarke v. Dickson*, it was afterwards incorporated and registered for the purpose of a voluntary winding-up. It was held that the change in the condition of the company and of its shares was such as to make restitution impossible and therefore the contract could not be rescinded.⁹⁶ It has

⁹⁰ Per Cur. *Morrison v. Universal Marine Insurance Co.* (1873) (Ex. Ch.) L. R. 8 Ex. at 205; cp. *Clough v. L. & N. W. Ry. Co.* (1871) (Ex. Ch.) L. R. 7 Ex. at 35.

⁹² (1859) E. B. & E. 148; 27 L. J. Q. B. 223; 113 R. R. 583.

⁹³ The fact of the winding-up having begun before the repudiation of the shares is of itself decisive according to the cases under the later Companies Acts; but here the point was hardly made. *Dicta* in the case going beyond the reason given in the text are not to be trusted: per McCardie J. [1917] 2 K. B. 829.

⁹⁴ Which course was accordingly taken with success: *Clarke v. Dickson* (1859) 6 C. B. N. S. 453; 28 L. J. C. P. 225; 120 R. R. 217. These principles do not apply where a shareholder, having had his shares forfeited for non-payment of calls, and thereby ceased to be a member of the company, is sued for the calls in arrear and defends on the ground of fraud. After he is remitted to the position of a mere debtor of the company he is not bound to take any active steps: *Aaron's Reefs v. Twiss* [1896] A. C. 273; 65 L. J. P. C. 54.

⁹⁵ E. B. & E. at 152; 113 R. R. 585.

⁹⁶ (1867), L. R. 1 Sc. 145. [See, too, *Spence v. Crawford* [1939] 3 All E. R. 269, a case of rescission accompanied by *restitutio in integrum*.]

It would seem, but it does not clearly appear, that in this case also the misrepresentations were not discovered till after the commencement of the winding-up.

been suggested that where goods or securities have been delivered under a contract voidable by the buyer on the ground of fraud, and before the repudiation their value has materially fallen through some cause unconnected with the fraud, this is such a change in the condition of the thing contracted for as to make restitution impossible in law;⁹⁷ but this view has been rejected in a case where a fiduciary relation was abused,⁹⁸ and it does not seem easy to distinguish this from other kinds of fraud in its consequences. The case is simpler where the party misled has himself chosen to deal with the subject matter of the contract, by exercising acts of ownership or the like, in such a manner as to make restitution impossible; and it is still plainer if he goes on doing this with the knowledge of all the facts; if the lessee of mines, for example, goes on working out the mines after he has full information of the circumstances on which he relies as entitling him to set aside the lease.⁹⁹ So a settlement of partnership accounts or a release contained in a deed of dissolution¹ cannot be disputed by one of the parties if in the meantime the concern has been completely wound up and he has taken possession of and sold the partnership assets made over to him under the arrangement;² and an arrangement between a company and one of its directors which has been acted upon by the company so as to change the director's position cannot afterwards be repudiated by the company.³ So a purchaser cannot after taking possession maintain an action to recover back his deposit.⁴

The right to recover back money paid under an agreement on the ground of mistake, failure of consideration, or default of the other party is also subject to the same rule. Thus a lessee who has entered into possession cannot recover back the premium paid by him on the ground of the lessor's default in executing the lease and doing repairs to be done by him under the agreement:⁵ nor can a party recover back an excessive payment after his own dealings have made it impossible to ascertain what was really due.⁶

3. EFFECT OF RIGHTS ACQUIRED BY THIRD PERSONS

The contract cannot be rescinded after third persons have acquired rights under it for value.

The present rule is altogether, as the last one is to some extent,

⁹⁷ *Waddell v. Blockey* (1879) 4 Q. B. Div. 678, 683; 48 L. J. Q. B. 517, per Thesiger, L. J.

⁹⁸ *Armstrong v. Jackson* [1917] 2 K. B. 822, 828; 86 L. J. K. B. 1375.

⁹⁹ *Vigers v. Pike* (1840-2) 8 Cl. & F. 562, 650; 54 R. R. 114.

¹ *Urquhart v. Macpherson* (1878) 3 App. Ca. 831.

² *Skilbeck v. Hilton* (1866) L. R. 2 Eq. 587.

³ *Sheffield Nickel Co. v. Unwin* (1877) 2 Q. B. D. 214; 46 L. J. Q. B. 299.

⁴ *Blackburn v. Smith* (1848) 2 Ex. 783; 18 L. J. Ex. 187; 76 R. R. 785; but it was also held that apart from this the objection came too late under the conditions of sale in the particular case.

⁵ *Hunt v. Silk* (1804) 5 East, 449; 7 R. R. 799.

⁶ *Freeman v. Jeffries* (1869) L. R. 4 Ex. 189, 197; 38 L. J. Ex. 116. [Cf. *Anglo-Scottish Beet Sugar Corporation v. Spalding U.D.C.* [1937] 2 K. B. 607, 628-631; 106 L. J. K. B. 885.]

a corollary from the main principle that a contract induced by fraud or misrepresentation is as such not void but only voidable. The result is that when third persons have acquired rights under the transaction in good faith and for value, those rights are indefeasible. The rule is also stated to be an application of the principle of convenience "that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud."

Thus when a sale of goods is procured by fraud, the property in the goods is transferred by the contract,⁸ subject as between the seller and the buyer to be re-vested by the seller exercising his option to rescind when he discovers the fraud. A purchaser in good faith⁹ from the fraudulent buyer acquires an indefeasible title¹⁰ now confirmed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which abolished a statutory exception.¹¹ And a person who takes with notice of the fraud is a lawful possessor as against third persons, and as such is entitled to sue them for all injuries to the property, unless and until the party defrauded exercises his right of rescission.¹²

The same rule holds good as to possession or other partial interests in property. A. sells goods to B., but resumes the possession, by arrangement with B., as a security for the price. Afterwards B. induces A. to re-deliver possession of the goods to him by a fraudulent misrepresentation, and thereupon pledges the goods to C., who advances money upon them in good faith and in ignorance of the fraud. This pledge is valid, and C. is entitled to the possession of the goods as against A.¹³

It must be carefully observed that a fraudulent possessor cannot give a better title than he has himself, even to an innocent purchaser, if the possession has not been obtained under a contract with the true owner, but by mere fraudulent misrepresentation as

⁷ *Babcock v. Lawson* (1880) 4 Q. B. D. at 400.

⁸ *Load v. Green* (1846) 15 M. & W. 216; 15 L. J. Ex. 113; 71 R. R. 627, where it was held that a fraudulent buyer becoming bankrupt had not the goods in his order and disposition with the consent of the true owner; for the vendors became the true owners only when they elected to rescind and demanded the goods from the assignees.

⁹ The burden of proof is on the original seller to show the contrary; s. 23 of the Sale of Goods Act makes no difference: *Whitehorn Bros. v. Davison* [1911] 1 K. B. 463; 80 L. J. K. B. 425, C. A.

¹⁰ *White v. Garden* (1851) 10 C. B. 919; 20 L. J. C. P. 166; 84 R. R. 846; *Stevenson v. Neunham* (1853) (Ex. Ch.) 13 C. B. 285, 303; 22 L. J. C. P. 110, 115; 93 R. R. 532, 542; cp. 12 App. Ca. at 489.

¹¹ Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100, extended the re-vesting of property in the true owner upon the thief's conviction to cases of obtaining goods by criminal fraud not amounting to larceny: *Bentley v. Vilmon* (1887) 12 App. Ca. 471; 57 L. J. Q. B. 18, overruling *Moyce v. Newington* (1878) 4 Q. B. D. 32; 48 L. J. Q. B. 125; the Sale of Goods Act, s. 24, restores the older law.

¹² *Stevenson v. Neunham*, see note ¹⁰.

¹³ *Pease v. Gloaghec* (1866) L. R. 1 P. C. 219; 35 L. J. P. C. 66; 146 R. R. 181. The dealings were in fact with the bill of lading; but as this completely represented the goods for the purposes of the case the statement in the text is simplified in order to bring out the general principle more clearly. A later case of the same kind is *Babcock v. Lawson* (1880) 5 Q. B. Div. 284; 49 L. J. Q. B. 408.

to some matter of fact concerning the true owner's contract with a third person. To put a simple case, A. sells goods to B. and desires B. to send for them. C. obtains the goods from A. by falsely representing himself as B.'s servant: now C. acquires neither property nor lawful possession, and cannot make any sale or pledge of the goods which will be valid against A., though the person advancing his money have no notice of the fraud. The result is the same if A. means to sell goods to B. & Co., and C. gets goods from A. by falsely representing himself as a member of the firm and authorized to act for them,¹⁴ or if B., a person of no credit, gets goods from A. by trading under a name and address closely resembling those of C., who is known to A. as a respectable trader.¹⁵ It is also the same in the less simple case of a third person obtaining delivery of the goods by falsely representing himself as a sub-purchaser; for here there is no contract between him and the seller which the seller can affirm or disaffirm; what the seller does is to act on the mistaken notion that the property is already his by transfer from the original buyer. This was in effect the decision of the Exchequer Chamber in *Kingsford v. Merry*,¹⁶ though the case was a little complicated by the special consideration of the effect of delivery orders or warrants as "indicia of title."

The decision of the House of Lords in *Oakes v. Turquand*,¹⁷ which settled that a shareholder in a company cannot repudiate his shares after the commencement of a winding-up, proceeded to a considerable extent upon the language of the Companies Act, 1862, in the sections defining who shall be contributories. But the broad principles of the decision, or if we prefer to say so, of the Act as interpreted by it, are these. The rights of the company's creditors and of the shareholders are fixed at the date of the winding-up and are not to be afterwards varied. The creditors are entitled to look for payment in the first instance to all persons who are actually members of the company at the date of the winding-up. And this class includes shareholders who were entitled as

¹⁴ *Hardman v. Booth* (1863) 1 H. & C. 803; 32 L. J. Ex. 105; 130 R. R. 784; *Hollins v. Fowler* (1874-5) 1 L. R. 7 H. L. 757, 795; [*Lake v. Simmons* [1927] A. C. 487; 96 L. J. K. B. 621].

¹⁵ *Cundy v. Lindsay* (1878) 3 App. Ca. 459; 47 L. J. Q. B. 481. Otherwise where the fraud stops short of personation, and is only a false representation of the party's condition and means: *Attenborough v. St. Katharine's Dock Co.* (1878) 3 C. P. Div. 450; 47 L. J. Ch. 763; cp. *Edmunds v. Mechts. Desp. Transp. Co.*, 135 Mass. 283; *Phillips v. Brooks* [1919] 2 K. B. 243; 88 L. J. K. B. 953, which go farther. [Note that the fraudulent adoption of another name does not necessarily make a contract void, though it may make it voidable; whether it has the one effect or the other depends upon the facts of the case. In *King's Norton Metal Co., Ltd. v. Edridge, Merrett & Co., Ltd.* (1897) 14 T. L. R. 98 (C. A.), it merely rendered the contract under which goods were supplied by B. to A. voidable, and therefore C., a *bona fide* purchaser for value of them from A. before the contract was avoided by B., acquired a good title to them. See p. 381 *ante* for the discussion of this case in connexion with *Gordon v. Street* [1899] 2 Q. B. 641, and *Sowler v. Potter* [1940] 1 K. B. 271].

¹⁶ (1856) 1 H. & N. 503; 26 L. J. Ex. 83; 108 R. R. 694 (see per Erle J. at 88); 108 R. R. 694, revg. s. c. in Court below, 11 Ex. 577; 25 L. J. Ex. 166.

¹⁷ (1867) L. R. 2 H. L. 325; 36 L. J. Ch. 949. This principle applies to a voluntary as well as a compulsory winding-up: *Stone v. City and County Bank* (1877) 3 C. P. Div. 282; 47 L. J. C. P. 681.

against the company to repudiate their shares, on the ground of fraud but have not yet done so. For their obligations under their contracts with the company, including the duty to contribute in the winding-up, were valid until rescinded, and the creditors in the winding-up must be considered as being, to the extent of their claims, purchasers for value of the company's rights against its members. They are not entitled to any different or greater rights: no shareholder can be called upon to do more than perform his contract with the company.¹⁸

It is now settled law that the same rule applies to joint-stock companies not under the Companies Acts. And the date after which it is too late to repudiate shares may be earlier than the commencement of the winding-up. Probably the actual insolvency of the company fixes this date; at all events, a shareholder cannot repudiate after the directors have convened an extraordinary meeting to consider whether the company shall be wound up. For thus, 'by holding out to the body of creditors the prospect of a voluntary winding-up,' the directors, who are the shareholder's agents as long as he remains a shareholder, stay the hands of the creditors from compulsory proceedings.¹⁹ And the rule holds even if there are no unpaid creditors. "The doctrine is, that after the company is wound up it ceases to exist, and rescission is impossible."²⁰

On the other hand, persons who have taken any gratuitous benefit under a fraudulent transaction, though themselves ignorant of the fraud, are in no better position than the original contriver of it. Thus where a creditor was induced to give a release to a surety by fraud practised on him by the principal debtor, of which the surety was ignorant, and the surety gave no consideration for the release, it was held that this release might be disaffirmed by the creditor on discovering the fraud. But third persons who on the faith of the release being valid had advanced money to the surety to meet other liabilities would be entitled to assert a paramount claim.²¹

4. RESCISSION MUST BE TIMELY

The contract must be rescinded within a reasonable time, that is, before the lapse of a time, after the true state of things is known, so long that in the circumstances of the particular case the other party may fairly infer that the right of rescission is waived.

¹⁸ *Waterhouse v. Jamieson* (1870) L. R. 2 Sc. 29. In *Hall v. Old Talargoch Lead Mining Co.* (1876) 3 Ch. D. 749; 45 L. J. Ch. 775, an action for rescission and indemnity commenced by a shareholder after a resolution for winding-up but in ignorance of it was allowed to proceed. Here however relief was claimed against the directors personally as well as the company.

¹⁹ *Tennent v. City of Glasgow Bank* (1879) 4 App. Ca. 615.

²⁰ *Burgess's case* (1880) 15 Ch. D. 507, 509; 49 L. J. Ch. 541 (Jessel M.R.).

²¹ *Scholefield v. Templer* (1859) Johns. 155, 165; 4 De G. & J. 429; 28 L. J. Ch. 432. The Court below endeavoured to provide for the payment of the third persons in question (Johns. 171), but the Court of Appeal varied the decree by making it simply without prejudice to their rights: 4 De G. & J. 435; 224 R. R. 324.

It is believed that the statement of the rule in some such form as this will reconcile the substance and language of all the leading authorities. On the one hand it is often said that the election must be made within a reasonable time, while on the other hand it has several times been explained that lapse of time as such has no positive effect of its own. The Court is specially cautious in entertaining charges of fraud or misrepresentation brought forward after a long interval of time; it will anxiously weigh the circumstances, and consider what evidence may have been lost in consequence of the time that has elapsed.²² But time alone is no bar to the right of rescinding a voidable transaction; and the House of Lords in one case set aside a purchase of a principal's estate by his agent in another name after the lapse of more than half a century, the facts having remained unknown to the principal and his representative for thirty-seven years.²³ In a later case the Lord Justice Turner stated expressly that "the two propositions of a bar by length of time and by acquiescence are not distinct propositions." Length of time is evidence of acquiescence, but only if there is knowledge of the facts, for a man cannot be said to have acquiesced in what he did not know.²⁴ Lord Campbell slightly qualified this by adding, that although it is for the party relying on acquiescence to prove the facts from which consent is to be inferred, "it is easy to conceive cases in which, from great lapse of time, such facts might and ought to be presumed."²⁵

The rule has been laid down and acted upon by the Judicial Committee in this form: "In order that the remedy should be lost by laches or delay, it is, if not universally, at all events ordinarily . . . necessary that there should be sufficient knowledge of the facts constituting the title to relief."²⁶

To the same effect it has been said in the Supreme Court of the United States: "Acquiescence and waiver are always questions of fact. There can be neither without knowledge." And the knowledge must be actual, not merely possible or potential: "the wrong-doer cannot make extreme vigilance and promptitude conditions of rescission."²⁷

Acquiescence need not be manifested by any positive act; the question is, whether there is sufficient evidence either from lapse of time or from other circumstances of "a fixed, deliberate and unbiassed determination that the transaction should not be

²² *Cp. Bright v. Legerton* (1861) 2 D. F. J. 606, 617; 30 L. J. Ch. 338; 129 R. R. 216.
²³ *Charter v. Trevelyan* (1844) 11 Cl. & F. 714, 740; 65 R. R. 305, 320.

²⁴ *Life Association of Scotland v. Siddal* (1861) 3 D. F. J. 58, 72, 74; 130 R. R. 28: on the point that there cannot be acquiescence without knowledge; *cp. Lloyd v. Attwood* (1858-9) 3 De G. & J. 614, 650; 29 L. J. Ch. 97; per Alderson B. *Load v. Green* (1846) 15 M. & W. at 217; 71 R. R. 268; "A man cannot *permit* who does not know that he has a right to refuse": and per Jessel M.R. 1 Ch. D. 528.

²⁵ 3 D. F. J. at 77. The case was one not of rescinding a contract but of a breach of trust; but the principles are the same.

²⁶ *Lindsay Petroleum Co. v. Hurd* (1874) L. R. 5 P. C. 241.

²⁷ *Pence v. Langdon* (1878) 99 U. S. at 581. [See, too, Williston, Contracts, § 1526.]

impeached."²⁸ In estimating the weight to be given to length of time as evidence of acquiescence the nature of the property concerned is material.²⁹ And other special circumstances may prevent lapse of time even after everything is known from being evidence of acquiescence; as when nothing is done for some years because the other party's affairs are in such a condition that proceedings against him would be fruitless.³⁰ "In questions of this kind it is not only time but the conduct of the parties which has to be considered."³¹

If a party entitled to avoid a transaction has precluded himself by his own act or acquiescence from disputing it in his lifetime, his representatives cannot come forward to dispute it afterwards.³²

It is said that holders of shares in companies are under a special obligation of diligence as to making their election, but the *dicta* relate chiefly if not wholly to objections apparent on the face of the memorandum or articles of association. With the contents of these a shareholder is bound to make himself acquainted, and must be deemed to become acquainted, when his shares are allotted.³³ But objections which can be taken upon these must proceed on the ground, not of fraud or misrepresentation as such, but of the undertaking in which shares are allotted being substantially a different thing from that which the prospectus described and in which the applicant offered to take shares. Nor are we aware of any case in which the rule has been applied to a repudiation of shares declared before a winding-up and on the ground of fraud or misrepresentation not apparent on the articles. Still it seems quite reasonable to hold that in the case of a shareholder's contract lapse of time without repudiation is of greater importance as evidence of assent than in most other cases.

The authorities thus far cited have been from courts of equity. The same general principle was laid down in the Exchequer Chamber in 1871. "We think the party defrauded may keep the question open so long as he does nothing to affirm the contract . . . In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the

²⁸ Per Turner L.J. *Wright v. Vanderplank* (1855) 8 D. M. G. 133, 147; 25 L. J. Ch. 733; 114 R. R. 60. The epithets, however, are more specially appropriate to the particular ground of rescission (undue influence) then before the Court. More generally, the only proper meaning of acquiescence is quiescence under such circumstances that assent may be reasonably inferred from it: per Cur. in *De Bussche v. Alt* (1877) 8 Ch. Div. at 314; 47 L. J. Ch. 386.

²⁹ 8 D. M. G. at 150.

³⁰ *Scholefield v. Templer* (1859) 4 De G. & J. 429; 28 L. J. Ch. 452; 124 R. R. 324.

³¹ *Rochevoucauld v. Boustead* [1897] 1 Ch. 196, 211, C. A., per Cur.

³² *Skottowe v. Williams* (1861) 3 D. F. J. 535, 541; 130 R. R. 243.

³³ *Central Ry. of Venezuela v. Kisch* (1867) L. R. 2 H. L. at 125; *Oakes v. Turquand* (1867) *ib.* at 352; and see Ch. 9, pp. 388—389.

interval whilst he is deliberating an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract and when the lapse of time is great it probably would in practice be treated as conclusive evidence to show that he has so determined."³⁴

The law of British India,³⁵ France³⁶ and many of the United States treats the right of having a contract judicially set aside for fraud, &c., as a substantive right of action and limits a fixed period running from the discovery of the truth within which it must be exercised.

One or two points remain to be mentioned, which we have reserved to the last as being matter of procedure, but which depend upon general principles. Courts of justice are anxious to discover and discourage fraud in every shape, but they are no less anxious to discourage and rebuke loose or unfounded charges of fraud and personal misconduct. The fact relied on as establishing a case of fraud must be distinctly alleged and proved.³⁷ Where such charges are made and not proved, this will not prevent the party making them from having any relief to which he may otherwise appear to be entitled, but he must pay the costs occasioned by the unfounded charges.³⁸ And in one case, where the plaintiff made voluminous and elaborate charges of fraud and conspiracy, which proved to be unfounded, the Court of Appeal not only made him pay the costs of that part of the case, but refused to allow him the costs even of the part on which he succeeded. It was held that he had so mixed up unfounded and reckless aspersions upon character with the rest of the suit as to forfeit his title to the costs which he otherwise would have been entitled to receive.³⁹

The jurisdiction (originally peculiar as courts of equity) to order the cancellation of an instrument obtained by fraud or misrepresentation is not affected by the probability or practical certainty that the plaintiff would have a good defence to an action on the

³⁴ *Per Cur. Clough v. L. & N. W. Ry. Co.* (1871) L. R. 7 Ex. at 34, repeated in *Morrison v. Universal Marine Insurance Co.* (1873) L. R. 8 Ex. at 203, and cited by Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App. Ca. at 1277, see the remarks on delay and acquiescence in the several judgments in that case. Note that the judgment of the Ex. Ch. in *Clough v. L. & N. Ry. Co.* was prepared though not delivered by Blackburn J. as stated by him later when a Lord of Appeal: *Scarf v. Jardine* (1882) 7 App. Ca. at 360.

³⁵ The Indian Limitation Act (originally XV. of 1877, now IX. of 1908), three years.

³⁶ Code Civ. 1304, ten years. Five or six might be a juster mean.

³⁷ Thus under the old system of equity pleading a charge of fraud in general terms would not support a bill on demurrer: *Gilbert v. Lewis* (1862) 1 D. J. S. 38, at 49; 32 L. J. Ch. 347; 137 R. R. 138, per Lord Westbury; cp. *Lawrance v. Norreys* (1890) 15 App. Ca. 210; 159 L. J. Ch. 681, as to allegations of concealed fraud within the Statute of Limitations.

³⁸ *Hilliard v. Eiffe* (1874) L. R. 7 H. L. 39, 51, 52; *London Chartered Bank of Australia v. Lempière* (1873) L. R. 4 C. P. at 597; *Clinch v. Financial Corporation* (1868) L. R. 5 Eq. at 483; 38 L. J. Ch. 1; per Lord Cairns, *Thomson v. Eastwood* (1877) 2 App. Ca. at 243.

³⁹ *Parker v. McKenna* (1874) L. R. 10 Ch. 96, 123, 125; 44 L. J. Ch. 425.

instrument, nor is it less to be exercised even if the instrument is already in his possession. He is entitled not only not to have the contract enforced against him but to have it judicially annulled.⁴⁰

⁴⁰ *London and Provincial Insurance Co. v. Seymour* (1873) L. R. 17 Eq. 85 ; 43 L. J. Ch. 120 ; and see *Hoare v. Bremridge* (1872) L. R. 8 Ch. 22 ; 42 L. J. Ch. 1, there explained and distinguished. Therefore a defendant sued on an instrument which he alleges to be voidable may properly add to his defence a counter-claim for the cancellation of the instrument. It may also be proper to ask for a transfer to the Chancery Division if the action is in the King's Bench Division, but this is not a matter of course. See *Storey v. Waddle* (1879) 4 Q. B. Div. 289. Where, conversely, a purchaser sues for the return of his deposit, and the vendor counter-claims for a specific performance, a transfer to the Ch. D. will generally be ordered : *London Land Co. v. Harris* (1884) 13 Q. B. D. 540 ; 53 L. J. Q. B. 536.

12

DURESS AND UNDUE INFLUENCE

If the consent of one party to a contract is obtained by the other under such circumstances that the consent is not free, the contract is voidable at the option of the party whose consent is so obtained. It is quite clear that it is not merely void so long as there is consent in fact.¹ The transaction might indeed be void if the party were under actual physical constraint, as if his hand were forcibly guided to sign his name; but this would be not because his consent was not free, but because there was no consent at all.

What then are the circumstances which are held by English courts to exclude freedom of consent? The treatment of this question has at common law been singularly narrow and in equity singularly comprehensive.

1. DURESS AT COMMON LAW

At common law the coercion which will be a sufficient cause for avoiding a contract may consist in *duress* or *menace*; that is, either in actual compulsion or in the threat of it. In modern books the term *duress* is used to include both species. It is said that there must be some threatening of life or member, or of imprisonment, or some imprisonment or beating itself. Threatening to destroy or detain, or actually detaining property, does not amount to duress.² And this applies to agreements not under seal as well as to deeds.³ The reason appears to be that the detainer is a wrong of itself, for which there is an appropriate remedy. Should the party choose to make terms instead of pursuing his rights (at all events when there is nothing to prevent him from so doing), he cannot afterwards turn round and complain that the terms were forced upon him.⁴ "It must be a threatening, beating, or

¹ Co. 2 Inst. 482, and 2nd resolution in *Whelpdale's case* (1604), 5 Co. Rep. 119. In [three] modern cases a marriage has been annulled on the ground that coercion, or a mixture of coercion and fraud, had gone to the point of excluding any real consent on the woman's part: *Scott v. Sebright* (1886) 12 P. D. 21; 56 L. J. P. 11; *Ford v. Stier* [1896] P. 1; 65 L. J. P. 13; [*Hussein v. Hussein* [1938] P. 159; 107 L. J. P. 105]. The facts of all three cases were most exceptional.

² Shepp. Touch. 61. [The term "duress" has, however, been applied to procuring the payment of money by threats which involve neither personal injury nor the destruction or detention of property: e.g., a threat to put a trader on a "stop list" unless he paid money by way of compromise: *Hardie & Lane, Ltd. v. Chilton* [1928] 2 K. B. 306; 97 L. J. K. B. 539; see, too, *Fisher v. Apollinaris Co.* (1875) L. R. 10 Ch. 297; 44 L. J. Ch. 500: in both these cases it was held that the facts did not establish duress. The American Restatement of Contracts, § 493, includes under duress "threats of wrongfully destroying, injuring, seizing or withholding land or other things." See, too, Williston, *Contracts*, §§ 1603 *seq.*]

³ *Atles v. Backhouse* (1838) 3 M. & W. 633; *Skeate v. Beale* (1840) 11 A. & E. 989; 52 R. R. 558.

⁴ See *Silliman v. United States* (1879) 101 U. S. 465.

imprisonment of the party himself that doth make the deed, or his wife" or (it seems) parent or child.⁶ And a threat of imprisonment is not duress unless the imprisonment would be unlawful. This is illustrated by two rather curious cases, in both of which the party's consent was determined by the fear of confinement in a lunatic asylum. In *Cumming v. Ince*⁷ the plaintiff had been taken to a lunatic asylum and deprived of the title deeds of certain property claimed by her. Proceedings were commenced under a commission of lunacy, but stayed on the terms of an arrangement signed by counsel on both sides, under which the deeds were to be deposited in certain custody. The plaintiff afterwards repudiated this arrangement and brought detinue for the deeds. On an issue directed to try the right to the possession of the deeds as between herself and the other parties the Court held that in any view the defendants were wrong. For if their own proceedings under the commission were justified, they could not say the plaintiff was competent to bind herself, and if not, the agreement was obtained by the fear of a merely unlawful imprisonment and therefore voidable on the ground of duress. And it made no difference that the plaintiff's counsel was party to the arrangement. His assent must be considered as enforced by the same duress: for as her agent he might well have feared for her the same evils that she feared for herself. In *Biffin v. Bignell*,⁸ on the other hand, the defendant was sued for necessities supplied to his wife. She had been in a lunatic asylum under treatment for delirium tremens, and on her discharge the husband promised her 12s. a week to live apart from him, adding that if she would not he would send her to another asylum. The wife was accordingly living apart from the husband under this agreement. It was held that her consent to it was not obtained by duress, for under these circumstances "the threat, if any, was not of anything contrary to law, at least not so to be understood": consequently the presumption of authority to pledge the husband's credit was effectually excluded, and the plaintiff could not recover.⁹

The narrowness of the common law doctrines above stated is considerably mitigated in practice, for when money has been paid under circumstances of practical compulsion, though not amounting to duress, it can generally be recovered back. This is so when the payment is made to obtain the possession of property wrongfully detained,¹⁰ or, under protest, to avoid a threatened seizure,¹¹ and the property need not be goods for which the owner has an

⁶ See note 3, previous page.

⁶ Ro. Ab. 1. 687, pl. 5; Bac. Ab. *Duress* (B.).

⁷ (1847-8) 11 Q. B. 112; 17 L. J. Q. B. 105; 75 R. R. 295.

⁸ (1862) 7 H. & N. 877; 31 L. J. Ex. 189; 126 R. R. 739.

⁹ *Qu.* whether in any case he could have recovered without showing that the wife had repudiated the arrangement.

¹⁰ *Wakefield v. Newbon* (1844) 6 Q. B. 276, 280; 13 L. J. Q. B. 258; 66 R. R. 379;

Green v. Duckett (1883) 11 Q. B. D. 275; 52 L. J. Q. B. 435.

¹¹ *Maskell v. Horner* [1915] 3 K. B. 106; 84 L. J. K. B. 1752, C. A.

immediate pressing necessity, nor need the claim of the party detaining them be manifestly groundless, to make the payment for this purpose involuntary in contemplation of law.¹¹ So it is where excessive fees are taken under colour of office, though it be usual to pay them;¹² or where an excessive charge for the performance of a duty is paid under protest.¹³ The person who actually receives the money may properly be sued, though he receive it only as an agent.¹⁴ The case of one creditor exacting a fraudulent preference from a debtor as the price of his assent to a composition¹⁵ is to a certain extent analogous. But in all these cases the foundation of the right to recover back the money is not the involuntary character of the payment in itself, but the fact that the party receiving it did no more than he was bound to do already, or something for which it was unlawful to take money if he chose to do it, though he had his choice in the first instance. Such payments are thus regarded as made without consideration. The legal effect of their being practically involuntary, though important, comes in the second place; the circumstances explain and excuse the conduct of the party making the payment. Similarly in the kindred case of a payment under mistake the actual foundation of the right is a failure of consideration, and ignorance of material facts accounts for the payment having been made. The common principle is that if a man chooses to give away his money, or to take his chance whether he is giving it away or not, he cannot afterwards change his mind; but it is open to him to show that he supposed the facts to be otherwise or that he really had no choice. The difference between the right to recover money back under circumstances of this kind and the right to rescind a contract on the ground of coercion is further shown by this, that an excessive payment is not the less recoverable if both parties honestly supposed it to be the proper payment.¹⁶ We proceed to consider the more extensive doctrines of equity.

2. THE EQUITABLE DOCTRINE OF UNDUE INFLUENCE¹⁷

In equity there is no rule defining inflexibly what kind or amount of compulsion shall be sufficient ground for avoiding a transaction, whether by way of agreement or by way of gift. The question to be decided in each case is whether the party was a free and voluntary agent.¹⁸

¹¹ *Shaw v. Woodcock* (1827) 7 B. & C. 73; 31 R. R. 158.

¹² *Dew v. Parsons* (1819) 2 B. & Ald. 562; 21 R. R. 404; *Steele v. Williams* (1853) 8 Ex. 625; 22 L. J. Ex. 225; 91 R. R. 673.

¹³ *Parker v. G. W. Ry. Co.* (1844) 7 M. & Gr. 253, 292; 13 L. J. C. P. 105. And see other authorities collected in notes to *Marriott v. Hampton* (1796) 2 Sm. L. C. 387 *sqq.*

¹⁴ *Steele v. Williams*, note ¹².

¹⁵ *Atkinson v. Denby* (1861) 6 H. & N. 778; 30 L. J. Ex. 361, in Ex. Ch. 7 *ib.* 934; 31 L. J. Ex. 362; 123 R. R. 835; Ch. VIII., p. 346.

¹⁶ *Dew v. Parsons* (1819) 2 B. & Ald. 562; 21 R. R. 404.

¹⁷ [See *W. H. D. Winder* in 56 L. Q. R. (1940) 97—112.]

¹⁸ *Williams v. Bayley* (1866) L. R. 1 H. L. 200, 210; 35 L. J. Ch. 717.

Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property," which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment. The difference between a gift and a manifestly disadvantageous contract is for this purpose only a matter of degree.

"The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed."²⁰ Such cases are thus classified by Cotton L.J. "First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies [*sic*] the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."²¹ Yet in many cases of the second class the circumstances might, if they could be fully brought out, amount to proof of actual compulsion or fraud;²² so that it may perhaps be said that undue influence means an influence in the nature of compulsion or fraud, the exercise of which in the particular instance to determine the will of the one party to the advantage of the other is not specifically proved, but is inferred from an existing relation of dominion on the one part and submission on the other.²³ Given a position of general and habitual influence, its exercise in the particular case is presumed.

But again, this habitual influence may itself be presumed to exist as a natural consequence of the condition of the parties,

¹⁹ ["Person" here is not limited to the actual owner of the property, but includes also one who has control of the property on behalf of the actual owner: *Chennells v. Bruce* (1939) 55 T. L. R. 422.]

²⁰ Per Lord Kingsdown, *Smith v. Kay* (1859) 7 H. L. C. at 779.

²¹ *Allcard v. Skinner* (1887) 36 Ch. Div. 145, 171; 56 L. J. Ch. 1052.

²² *Ibid.* per Lindley L.J. 36 Ch. Div. at 183.

²³ In *Boys v. Rassborough* (1856-7) 6 H. L. C. at 48; 108 R. R. 11, it is said that, taking the words in a wide sense, all undue influence may be resolved into coercion and fraud; but the case there considered is that of a will, in which undue influence has a more restricted meaning than in transactions *inter vivos*: see note ²⁴.

though it be not actually proved that the one habitually acted as if under the domination of the other. There are many relations of common occurrence in life from which "the Court presumes confidence put" in the general course of affairs "and influence exerted" in the particular transaction complained of.²⁴

Persons may therefore not only be proved by direct evidence of conduct, but presumed by reason of standing in any of these suspected relations, as they may be called, to be in a position of commanding influence over those from whom they take a benefit. In either case they are called upon to rebut the presumption that the particular benefit was procured by the exertion of that influence, and was not given with due freedom and deliberation. They must "take upon themselves the whole proof that the thing is righteous."²⁵ A stringent rule of evidence is imposed as a safeguard against evasions of the substantive law.

"Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."²⁶

"Nothing can be more important to maintain than the jurisdiction, long asserted and upheld by the Court, in watching over and protecting those who are placed in a situation to require protection as against acts of those who have influence over them, by which acts the person having such influence obtains any benefit to himself. In such cases the Court has always regarded the transaction with jealousy"²⁷—"a jealousy almost invincible," in Lord Eldon's words.²⁸

"In equity, persons standing in certain relations to one another, such as parent and child,²⁹ man and wife,³⁰ doctor and patient,³¹ attorney and

²⁴ Per Lord Kingsdown, *Smith v. Kay* (1859) 7 H. L. C. 750, 779.

²⁵ *Gibson v. Jeyes* (1801) 6 Ves. 266, 276; 5 R. R. 295, 303. The like burden of proof is cast upon those who take any benefit under a will which they have themselves been instrumental in preparing or obtaining: *Fulton v. Andrew* (1875) L. R. 7 H. L. 448, 472; 44 L. J. P. 17.

²⁶ Per Lord Chelmsford, *Tate v. Williamson* (1866) L. R. 2 Ch. 55, 61.

²⁷ Lord Hatherley, *Turner v. Callins* (1871) L. R. 7 Ch. 329, 338.

²⁸ *Hatch v. Hatch* (1804) 9 Ves. at 297; 7 R. R. 197.

²⁹ *Archer v. Hudson* (1844) 7 Beav. 551; 13 L. J. Ch. 380; 64 R. R. 152; *Tuener v. Collins* (1871) L. R. Ch. 329; 41 L. J. Ch. 558.

³⁰ There does not appear to be any real authority for this; the relation of husband and wife is not within the rule: *Howes v. Bishop* [1909] 2 K. B. 390; 78 L. J. K. B. 796, C. A., see especially per Farwell L. J.; *Bank of Montreal v. Stuart* [1911] A. C. 120; 80 L. J. P. C. 75. [Where a man is betrothed to a woman, the presumption of undue influence is raised against him with respect to the transactions referred to in the text above; *Re Lloyds Bank, Ltd.* [1931] 1 Ch. 289, 302; 100 L. J. Ch. 45; *post*, p. 484.]

³¹ *Dent v. Bennett* (1839) 4 My. & Cr. 269; 48 R. R. 94; *Ahearne v. Hogan* (1844) Dru. 310; *s. v. Blackie v. Clark* (1852) 15 Beav. at 603; 92 R. R. 575.

client," confessor and penitent, guardian and ward," are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence."⁵⁴

This and all similar specifications are merely illustrative—"As no Court has ever attempted to define fraud, so no Court has ever attempted to define undue influence, which includes one of its many varieties."⁵⁵ The cases in which this jurisdiction has been actually exercised are considered as merely instances of the application of a principle "applying to all the variety of relations in which dominion may be exercised by one person over another."⁵⁶ On the other hand the mere existence of a fiduciary relation of some kind is not enough to raise a presumption of undue influence. A widow whose son is managing the father's estate is not disabled by any rule of law from making a free gift to her son if she thinks fit. Nor is independent advice necessary, in cases outside the specially guarded classes, save so far as it is material to show that the act was not only voluntary but understood.⁵⁷

It has even been said⁵⁸ that in every case where "one person obtains, by voluntary donation, a large pecuniary benefit from another," the person taking the benefit is bound to show "that the donor voluntarily

⁵² *Gibson v. Jeyes* (1801) 6 Ves. 266; 5 R. R. 295; *Holman v. Laynes* (1854) 4 D. M. G. 270; 23 L. J. Ch. 529; 102 R. R. 127; *Gresley v. Mousley* (1861) 4 De G. & J. 78, 94.

⁵³ *Hatch v. Hatch* (1804) 9 Ves. 292; 7 R. R. 195; *Maitland v. Irving* (1846) 15 Sim. 437; 74 R. R. 115.

⁵⁴ Per Lord Penzance, *Parfitt v. Lawless* (1872) L. R. 2 P. & D. 462, 468; 41 L. J. P. 68. It is to be noted that this does not apply to wills, as to which undue influence is never presumed: *ib.*; *Boyse v. Rossborough* (1856-7) 6 H. L. C. 2, 49; followed by Jud. Comm. *Baudains v. Richardson* [1906] A. C. 169; 75 L. J. P. C. 57; *Hudson v. Weatherill* (1854) 5 D. M. G. 301, 311, 313; 104 R. R. 134; though a disposition by will may be set aside as well as an act *inter vivos* when undue influence is actually proved; but then, it seems, the influence must be such as to "overpower the volition, without convincing the judgment": *Hall v. Hall* (1868) L. R. 1 P. & D. 482; 37 L. J. P. 40. See *Walker v. Smith* (1861) 29 Beav. 394, where between the same parties gifts by will were supported and a gift *inter vivos* set aside. Lord Penzance added to the list of suspected relations that of promoters of a company to the company which is their creature: *Erlanger v. New Sombrero Phosphate Co.* (1877) 3 App. Ca. at 1230. But is not *personal* confidence essential to make the present doctrine applicable? And has any case gone the length of casting on a promoter the burden of proving in the first instance that a contract between him and the company was a fair one? Cp. *Eden v. Ridsdale's Railway Lamp and Lighting Co.* (1889) 23 Q. B. Div. 368; 5 L. J. Q. B. 579, where the duty is put on the ground of agency.

⁵⁵ Lindley L. J. in *Alford v. Skinner* (1887) 36 Ch. Div. at 183.

⁵⁶ Sir S. Romilly, *arg.* *Huguenin v. Baseley* (1807) 14 Ves. 285; 9 R. R. 283; adopted by Lord Cottenham, *Dent v. Bennett* (1839) 4 My. & Cr. 269, 277; 48 R. R. 94, 102; *Billage v. Southey* (1852) 9 Ha. 534, 540; 89 R. R. 564. Cp. D. Augéseau (Œuvres, 1.299) "Parceque la raison de l'ordonnance est générale, et qu'elle comprend également tous ceux qui peuvent avoir quelque empire sur l'esprit des donateurs, y sont arrêtés en ont étendu la disposition aux maîtres, aux médecins, aux confesseurs." So Pothier, Tr. des donations entre-vifs, vol. vii. 441, in Œuvres, ed. Dupin, 1825.

⁵⁷ *Re Coomber* [1911] 1 Ch. 723; 80 L. J. Ch. 399, C. A.

⁵⁸ By Lord Romilly in *Cooks v. Lamotte* (1851) 15 Beav. 234, 240; 21 L. J. Ch. 371; 92 R. R. 397, 402; and *Hoghton v. Hoghton* (1852) 15 Beav. 278, 298; 92 R. R. 421, 430; cp. per Lord Hatherley in *Phillips v. Mullings* (1871) L. R. 7 Ch. 244, 246; 41 L. J. Ch. 211.

and deliberately performed the act, knowing its nature and effect"; that for this purpose a voluntary donation means any transaction in which one person confers a large pecuniary benefit on another, though it may be in form a contract;³⁹ and that such is the rule whether there is any confidential relation or not. But these *dicta* are not law. There is no general presumption against the validity of gifts as such.⁴⁰ Where grounds of unfavourable presumption exist, it is easier to set aside a mere gift than a transaction from which the plaintiff has derived some benefit, though not adequate to what was given for it; and attempts to disguise a gift as a dealing for value are almost fatal.⁴¹ Beyond this, it is conceived, the law does not go.

In the absence of any special relation from which influence is presumed, the burden of proof is on the person impeaching the transaction,⁴² and he must show affirmatively that pressure or undue influence was employed.

[It has been suggested that the test for deciding what coercion amounts to undue influence is whether the enforcement of the contract procured by it would be contrary to public policy.⁴³ This test was apparently approved by Porter J. (now Lord Porter) in *Mutual Finance, Ltd. v. Wetton & Sons, Ltd.*⁴⁴ The case was one of a guarantee procured from a family company by a threat to prosecute one of its members for forgery. The learned judge held that it was obtained by undue influence, and he expressed an opinion *obiter* that where there is a threat to prosecute, the doctrine is not limited to cases in which the party threatened is a relative of the party from whom the agreement is procured.⁴⁵]

SPECIAL RULES

Having thus stated the fundamental rules, we proceed to say something more of—

1. The auxiliary rules applied by courts of equity to voluntary gifts in general:
2. The like as to the influence presumed from special relations, and the evidence required in order to rebut such presumption:
3. What are the continuing relations between the parties from which influence has been presumed:

³⁹ *E.g. Cooke v. Lamotte* (1851) 15 Beav. 234; 21 L. J. Ch. 371; 92 R. R. 397; *Dent v. Bennett* (1839) 4 My. & Cr. 269, 273; 48 R. R. 94, 99.

⁴⁰ If there were, the elaborate discussion which took place, *e.g.*, in *Allcard v. Skinner* (1887) 36 Ch. Div. 145, would have been superfluous; and see *Henry v. Armstrong* (1881) 18 Ch. D. 668, which, though a decision of only co-ordinate authority with Lord Romilly's, expressed the clear sense of the Equity Bar ever since the present writer can remember it.

⁴¹ Also any innocent misrepresentation by the donee whereby a voluntary gift is obtained is ground in equity for avoiding the gift: *Re Glubb, Bamfield v. Rogers* [1900] 1 Ch. 354; 69 L. J. Ch. 278, C. A.

⁴² *Blackie v. Clark* (1852) 15 Beav. 595; 92 R. R. 570; *Toker v. Toker* (1863) 31 Beav. 629; 3 D. J. S. 487; 32 L. J. Ch. 422; 142 R. R. 135.

⁴³ [Salmond & Winfield, *Contracts*, 259.]

⁴⁴ [1937] 2 K. B. 389, 394—395; 106 L. J. K. B. 778.]

⁴⁵ [The American Restatement of Contracts, § 493, in its definition of duress, limits this species of it to threats of prosecuting "a husband, wife, child, or other near relative."]

4. From what circumstances, apart from any continuing relation, undue influence has been inferred; and herein of the doctrine of equity as to sales at an undervalue and "catching bargains":

5. The limits of the right of rescission.

I. AS TO VOLUNTARY DISPOSITIONS IN GENERAL*

A voluntary settlement which deprives the settlor of the immediate control of the property dealt with, though it be made not for the benefit of any particular donee, but for the benefit of the settlor's children or family generally, and free from any suspicion of unfair motive, is not in a much better position than an absolute and immediate gift. It seems indeed doubtful whether the Court does not consider it improvident to make in general indefinite contemplation of marriage the same kind of settlement which in contemplation and consideration of a definitely intended marriage it is thought improvident not to make.⁴⁶

It is conceived that the ground on which such dispositions are readily set aside at the instance of the settlor's representatives is not the imprudence of the thing alone, but an inference from it, coupled with other circumstances—such as the age, sex, and capacity of the settlor—that the effect of the act was not really considered and understood at the time when it was done.⁴⁷ A voluntary settlement in favour of a parent is eminently open to suspicion unless the donor is of mature age and experience.⁴⁸

The absence of a power of revocation has often been insisted upon as a mark of improvidence in a voluntary settlement; and it has been even held to be in itself an almost fatal objection; but the doctrine now settled by the Court of Appeal is that it is not conclusive, but is only to be taken into account as matter of evidence, and is of more or less weight according to the circumstances of each case.⁴⁹

2. PRESUMPTIONS

Auxiliary rules as to the influence presumed from special relations.

The principle on which the Court acts in such cases is not

* (Cp. *Dav. Conv.* 3, pt. 1, Appx. No. 4. [Among more recent works is *Dart, Vendors and Purchasers* (8th ed. 1929) ; see Index, "Voluntary Conveyance," "Voluntary Settlement."])

⁴⁶ *Everitt v. Everitt* (1870) L. R. 10 Eq. 405 ; 39 L. J. Ch. 777 ; but here some of the usual provisions were omitted.

⁴⁷ *Ib.* ; *Prideaux v. Lonsdale* (1863) 1 D. J. S. 433 ; 137 R. R. 260 ; this ground is strongly taken by *Jessel M.R.* in *Dutton v. Thompson* (1883) 23 Ch. Div. at 281 ; 52 L. J. Ch. 661 ; *James v. Couchman* (1885) 29 Ch. D. 212 ; 54 L. J. Ch. 838. So common ignorance or mistake of both parties as to the effect of an instrument may sometimes be inferred on the face of it from its unreasonable or unusual character ; see pp. 404—405.

⁴⁸ *Powell v. Powell* [1900] 1 Ch. 243 ; 69 L. J. Ch. 164.

⁴⁹ *Hall v. Hall* (1873) L. R. 8 Ch. 430 ; 42 L. J. Ch. 444, where the former cases are reviewed ; and see *Powell v. Powell*, last note.

affected either by the age or capacity of the person conferring the benefit, or by the nature of the benefit conferred.⁵⁰

"Where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it:" it will not be considered as determined whilst the influence derived from it can reasonably be supposed to remain.⁵¹

Where the influence has its inception in the legal authority of a parent or guardian, it is presumed to continue for some time after the termination of the legal authority, until there is what may be called a complete emancipation, so that a free and unfettered judgment may be formed, independent of any sort of control.⁵² It is obvious that without this extension the rule would be practically meaningless. It is said that as a general rule a year should elapse from the termination of the authority before the judgment can be supposed to be wholly emancipated: this of course does not exclude actual proof of undue influence at any subsequent time.⁵³ With regard to the evidence to be adduced to rebut the presumption in a transaction between a father and a son who has recently attained majority, the father is bound "to show at all events that the son was really a free agent, that he had adequate independent advice . . . that he perfectly understood the nature and extent of the sacrifice he was making and that he was desirous of making it."

"So again, where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect his client's interest as he would have done in the case of the client dealing with a stranger."⁵⁴

He must give all the reasonable advice against himself that he would have given against a third person.⁵⁵ And he must not deal with his client on his own account as an undisclosed principal. "From the very nature of things, where the duty exists that he should give his client advice, it should be disinterested advice; he cannot properly give that advice when he is purchasing himself

⁵⁰ Per Turner L.J. *Rhodes v. Bate* (1866) L. R. 1 Ch. 252, 257, 260; 35 L. J. Ch. 267; *Holman v. Loynes* (1854) 4 D. M. G. 270, 283; 23 L. J. Ch. 529; 102 R. R. 127, 137.

⁵¹ *Archer v. Hudson* (1844) 7 Beav. 551, 560; 13 L. J. Ch. 380; 64 R. R. 152; *Wright v. Vanderplank* (1855) 8 D. M. G. 133, 137, 146; 25 L. J. Ch. 753; 114 R. R. 60, 64; *Powell v. Powell* [1900] 1 Ch. 243; 69 L. J. Ch. 164.

⁵² See per Lord Cranworth in *Smith v. Kay* (1859), 7 H. L. C. at 772. The like as to solicitor and client: *Demerara Bauxite Co. v. Hubbard* [1923] A. C. 673; 92 L. J. P. C. 148.

⁵³ *Saury v. King* (1865) 5 H. L. C. at 655; 25 L. J. Ch. 482; 101 R. R. 317; *Casborne v. Barsham* (1839) 2 Beav. 76; 50 R. R. 106, seems not quite consistent with this; but there the plaintiff was not the client himself, but his assignee in insolvency, and the client's own evidence was rather favourable to the solicitor.

⁵⁴ *Gibson v. Jeyes* (1801) 6 Ves. 266, 278; 5 R. R. 295, 306. As to solicitor's charges, see *Lyddon v. Moss* (1859) 4 De G. & J. 104; 124 R. R. 179.

without telling his client that he is purchasing."⁵⁵ If the client becomes bankrupt, his trustee is entitled to the benefit of this special duty.⁵⁶

The result of the decisions has been thus summed up by the Judicial Committee of the Privy Council. "The Court does not hold that an attorney is incapable of purchasing from his client; but watches such a transaction with jealousy, and throws on the attorney the onus of showing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser."⁵⁷ He is not absolutely bound to insist on the intervention of another professional adviser. But if he does not, he must not be surprised at the transaction being disputed, and may have to pay his own costs even if in the result it is upheld. On the other hand the fact of independent advice is not of itself conclusive to rebut a presumption of undue influence. The adviser must be fully informed of the relevant circumstances and the advice "must be such as a competent and honest adviser would give if acting solely in the interest of the donor."⁵⁸ As to gifts, the rule is that the client must have competent independent advice,⁵⁹ and the Court must be satisfied that the influence has in fact ceased.⁶⁰ The result seems to be that it is all but impossible in law for a gift from client to solicitor to be unimpeachable.

GENERALLY

"The broad principle on which the Court acts in cases of this description is that, wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him the Court will not allow any transaction between the parties to stand unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him."⁶¹

In other words, every contract entered into by persons standing in such a relation is treated as being *uberrimae fidei*, and may be vitiated by silence as to matters which one of two independent parties making a similar contract would be in no way bound to communicate to the other; nor does it matter whether the omission is deliberate, or proceeds from mere error of judgment or inadvertence.⁶² The rule extends not only to beneficial transactions

⁵⁵ *McPherson v. Watt* (1877) (Sc.) 3 App. Ca. 254, 272.

⁵⁶ *Laddy's Trustee v. Peard* (1886) 33 Ch. D. 500.

⁵⁷ *Pisani v. A.-G. for Gibraltar* (1874) L. R. 5 P. C. 516, 536, 540.

⁵⁸ *Inche Noriah v. Shaik Allie bin Omar* [1929] A. C. 127; 98 L. J. P. C. 1.

⁵⁹ *Liles v. Terry* [1895] 2 Q. B. 679; 65 L. J. Q. B. 34, C. A. Acknowledgment of statute-barred debts from a client to his solicitor is on the same footing as a beneficial contract: *Lloyd v. Coote* [1915] 1 K. B. 242; 84 L. J. K. B. 567, unless the circumstances clearly exclude influence, per Rowlatt J. [1915] 1 K. B. 249.

⁶⁰ *Wright v. Carter* [1903] 1 Ch. 27; 72 L. J. Ch. 138, C. A.

⁶¹ *Per Wood V.-C. Tate v. Williamson* (1866) L. R. 1 Eq. at 536.

⁶² *Molony v. Kernan* (1842) 2 Dr. & W. 31, at 39; 59 R. R. 635.

with the confidential adviser, but to such as confer a benefit on any one closely connected with him."⁶³

Thus a medical attendant who makes with his patient a contract in any way depending on the length of the patient's life is bound not to keep to himself any knowledge he may have professionally acquired, whether by forming his own opinion or by consulting with other practitioners, as to the probable duration of the life.⁶⁴ Perhaps the only safe way, and certainly the best, is to avoid such contracts altogether.

In *Grosvenor v. Sherratt*,⁶⁵ where a mining lease had been granted by a young lady to her brother-in-law (the son of her father's executor) and uncle, at the inducement of the said executor, "in whom she placed the greatest confidence," it was held that it was not enough for the lessees to show that the terms of the lease were fair; they ought to have shown that no better terms could possibly have been obtained; and as they failed to do this, the lease was set aside.

This comes very near the case of an agent dealing on his own account with his principal, when "it must be proved that full information has been imparted, and that the agreement has been entered into with perfect good faith." Nor is the agent's duty altered though the proposal originally came from the principal and the principal shows himself anxious to complete the transaction as it stands.⁶⁶ The same rules apply to an executor who himself becomes the purchaser of part of his testator's estate.⁶⁷ But this obligation of agents and trustees for sale appears (as we have already considered, pp. 263-265) to be incidental to the special nature of their employment, and to be a duty founded on contract rather than one imposed by any rule of law which guards the freedom of contracting parties in general.

The duty cast upon a solicitor, or other person in a like position of confidence, who deals on his own account with his client, of disclosing all material circumstances within his knowledge, does not however bind him to communicate a "speculative and consequential" possibility which may affect the future value of the subject-matter of the transaction, but which is not more in his own knowledge than in the client's.⁶⁸

It must not be forgotten that the suspicion with which dealings

⁶³ *Barron v. Wills* [1900] 2 Ch. 121; 69 L. J. Ch. 832, C. A.; which also shows (if authority be needed) that a mere suggestion of independent advice, not followed up, will not validate such a transaction. This decision was affirmed in *H. L.* [1902] A. C. 271; 71 L. J. Ch. 609, on the broader ground that the nature of the transaction was not understood.

⁶⁴ *Popham v. Brooke* (1828) 5 Russ. 8; 53 R. R. 60.

⁶⁵ (1860) 28 Beav. 659, 663; 126 R. R. 284. This is an extreme case; but there was some evidence of independent offers being discouraged.

⁶⁶ *Dally v. Wonham* (1863) 33 Beav. 154; 32 L. J. Ch. 790; 140 R. R. 64.

⁶⁷ *Baker v. Read* (1854) 18 Beav. 398; affd. 3 W. R. 818; 104 R. R. 184; where however relief was refused on the ground of seventeen years' delay.

⁶⁸ *Edwards v. Meyrick* (1842) 2 Ha. 60, 74; 62 R. R. 23; *Holman v. Leynes* (1854) 4 D. M. G. at 280; 102 R. R. at 135.

between parents and children presumably still under parental influence" are regarded by courts of equity is to a certain extent counteracted by the favour with which dispositions of the kind known as family arrangements are treated. In many cases a balance has to be struck between these partly conflicting presumptions. "Transactions between parent and child may proceed upon arrangements between them for the settlement of property, or of their rights in property in which they are interested. In such cases this Court regards the transactions with favour. It does not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction."⁶⁹ On the other hand, the transaction may be one of bounty from the child to the parent, soon after the child has attained twenty-one. In such cases this Court views the transaction with jealousy, and anxiously interposes its protection to guard the child from the exercise of parental influence."⁷⁰

It must be observed that the rules concerning gifts, or transactions in the form of contract which are substantially gifts, from a son to a father, do not apply to the converse case of a gift from an ancestor to a descendant: there is no presumption against the validity of such a gift, for it may be made in discharge of the necessary duty of providing for descendants.⁷¹

3. Relations between the parties from which influence has been presumed.

It would be useless to attempt an exact classification of that which the Court refuses on principle to define or classify: but it may be convenient to follow an order of approximate analogy to the cases of well-known relations in which the presumption is fully established.

A. Relations in which there is a power analogous to that of parent or guardian.

Uncle *in loco parentis* and niece: *Archer v. Hudson* (1884) 7 Beav. 551; 13 L. J. Ch. 380; 64 R. R. 152; *Maitland v. Irving* (1846) 16 Sim.

⁶⁹ [Whether or not it has ceased is a question of fact; e.g., marriage of a daughter, coupled with her departure from the parental home does not necessarily terminate the influence: *Lancashire Loans, Ltd. v. Black* [1934] 1 K. B. 380; 103 L. J. K. B. 129.]

⁷⁰ Perhaps it is safer to say that the "almost invincible jealousy" of the Court is reduced to "a reasonable degree of jealousy"; cp. Lord Eldon's language in *Hatch v. Hatch* (1804) 9 Ves. at 296; 7 R. R. at 197, and *Tweddell v. Tweddell* (1822) Turn. & R. at 13; 23 R. R. 168. On the question of consideration, see *Williams v. Williams* (1866-7) L. R. 2 Ch. 294, 304; 36 L. J. Ch. 200.

⁷¹ *Baker v. Bradley* (1855) 7 D. M. G. 597, 620; 109 R. R. 245, 259. See also *Wallace v. Wallace* (1842) 2 Dr. & W. 452, 470; 59 R. R. 766; *Bellamy v. Sabine* (1835) 2 Ph. 425, 439; 78 R. R. 132; *Hoghton v. Hoghton* (1852) 15 Beav. 278, 300; 92 R. R. 421, 431; and on the doctrine of family arrangement not applying when a son without consideration gives up valuable rights to his father: *Savery v. King* (1856) 5 H. L. C. at 657; 101 R. R. 299, 318. A sale by a nephew to his uncle of his reversionary interest in an estate of which the uncle is tenant for life is not a family arrangement: *Talbot v. Staniforth* (1861) 1 J. & H. 484, 501; 128 R. R. 484, compromised on appeal, see 128 R. R. 499. As to the amount of notice that will affect a purchaser: *Bainbridge v. Browne* (1881) 18 Ch. D. 188; 50 L. J. Ch. 522.

⁷² *Beanland v. Bradley* (1854) 2 Sm. & G. 339; 97 R. R. 228; cp. *Re Coomber* 1 Ch. 723; 80 L. J. Ch. 399, C. A.

437; 74 R. R. 115. Stepfather in *loco parentis* and step-daughter: *Kempson v. Ashbee* (1874) L. R. 10 Ch. 15; 44 L. J. Ch. 195; *Espey v. Lake* (1852) 10 Ha. 260; 90 R. R. 362. Executor of a will (apparently in a like position) and the testator's daughter: *Grosvenor v. Sherratt* (1860) 28 Beav. 659; 26 R. R. 284.

Husband of a minor's sister with whom the minor had lived for some time before he came of age: *Griffin v. Deveuille* (1781) 3 P Wms. 131. But the mere fact of a minor living with a relative of full age does not raise a presumption of influence; or the presumption, if any, is rebutted by proof of business-like habits and capacity on the donor's part: *Taylor v. Johnston* (1882) 19 Ch. D. 603; 51 L. J. Ch. 789.

Two sisters living together, of whom one was in all respects the head of the house, and might be considered as in *loco parentis* towards the other, though the other was of mature years: *Harvey v. Mount* (1845) 8 Beav. 439; 68 R. R. 146. Brother and sister, where the sister at the age of 46 executed a voluntary settlement under the brother's advice and for his benefit: *Sharp v. Leach* (1862) 31 Beav. 491.

Husband and wife on the one part, and aged and infirm aunt of the wife on the other: *Griffiths v. Robins* (1818) 3 Mad. 191; 53 R. R. 34.

Distant relationship by marriage: the donor old, infirm, and his soundness of mind doubtful; great general confidence in the donee, who was treated by him as a son: *Steed v. Calley* (1836) 1 Kee. 620. This rather than the donor's insanity seems the true ground of the case: see 1 Kee, 644.

Keeper of lunatic asylum and recovered patient: *Wright v. Proud* (1860) 13 Ves. 136; 53 R. R. 22.

There are also cases of general control obtained by one person over another without any tie of relationship or lawful authority: *Bridgman v. Green* (1755) 2 Ves. Sr. 627; Wilm. 58, where a servant obtained complete control over a master of weak understanding: *Kay v. Smith* (1856) 21 Beav. 522, affirmed *nom. Smith v. Kay* (1859) 7 H. L. C. 750; 115 R. R. 367, where an older man living with a minor in a joint course of extravagance induced him immediately on his coming of age to execute securities for bills previously accepted by him to meet the joint expenses.

In *Lloyd v. Clark* (1843) 6 Beav. 309; 63 R. R. 85, the influence of an officer over his junior in the same regiment was taken into account as increasing the weight of other suspicious circumstances; but there is nothing in the case to warrant including the position of a superior officer in the general category of "suspected relations."

[Man engaged to be married and his *fiancée*: *Re Lloyds Bank, Ltd., Bomze v. Bomze* [1931] 1 Ch. 289; 100 L. J. K. B. 45. "In general, she reposes the greatest confidence in her future husband. . . . In many, if not most, cases she would sign almost anything he put before her" (Maugham J. at 302, contrasting the position of the *fiancée* with that of the wife).]

b. Positions analogous to that of solicitor.

Certified conveyancer acting as professional adviser: *Rhodes v. Bate* (1866) L. R. 1 Ch. 252; 35 L. J. Ch. 267. Counsel and confidential adviser: *Broun v. Kennedy* (1863) 33 Beav. 133, 148; 4 D. J. S. 217; 140 R. R. 47, 62.

Confidential agent substituted for solicitors in general management of affairs: *Huguenin v. Baseley* (1807) 14 Ves. 273; 9 R. R. 276.⁷⁵

⁷⁵ *A fortiori* where characters of steward and attorney are combined: *Harris v. Tremenhore* (1808) 15 Ves. 34; 10 R. R. 5. A flagrant case is *Baker v. Loader* (1872) L. R. 16 Eq. 49; 42 L. J. Ch. 113. Cp. *Moxon v. Payne* (1873) L. R. 8 Ch. 81; 43 L. J. Ch. 240, where however the facts are not given in any detail. As to a land agent

A person deputed by an elder relation, to whom a young man applied for advice and assistance in pecuniary difficulties, to ascertain the state of his affairs and advise him on relieving him from his debts: *Tate v. Williamson* (1866) L. R. 1 Eq. 528; 2 Ch. 55.

The relation of a medical attendant and his patient is treated as a confidential relation analogous to that between solicitor and client: *Dent v. Bennett* (1839) 4 My. & Cr. 269; 48 R. R. 94; *Billage v. Southee* (1852) 9 Ha. 534; 89 R. R. 564; *Ahearne v. Hogan* (1844) Dru. 310; though in *Blackie v. Clark* (1852) 15 Beav. 595; 92 R. R. 570, less weight appears to be attached to it. It does not appear in the last case whether the existence of "anything like undue persuasion or coercion" (p. 604) was merely *not proved* or positively *disproved*: on the supposition that it was *disproved* there would be no inconsistency with the other authorities. For another unsuccessful attempt to set aside a gift to a medical attendant, see *Pratt v. Barker* (1826-28) 1 Sim. 1; 4 Russ. 507; 27 R. R. 136; there the donor was advised by his own solicitor, who gave positive evidence that the act was free and deliberate.

c. Spiritual influence.

It is said that influence would be presumed as between a clergyman or any person in the habit of imparting religious instruction and another person placing confidence in him: *Dent v. Bennett* (1835) 7 Sim. at 546; 48 R. R. 97. There have been two remarkable modern cases of spiritual influence in which there were claims to spiritual power and extraordinary faculties on the one side, and implicit belief in such claims on the other; it was not necessary to rely merely on the presumption of influence resulting therefrom, for the evidence which proved the relation of spiritual confidence also went so far to prove as a fact in each case that a general influence and control did actually result: *Nottidge v. Prince* (1860) 2 Giff. 246; 29 L. J. Ch. 857; 128 R.R. 111; *Lyon v. Home* (1868) L. R. 6 Eq. 655; 37 L. J. Ch. 674.⁷⁴ In the former case at all events there was gross imposture, but the spiritual dominion alone would have been sufficient ground to set aside the gift: for the Court considered the influence of a minister of religion over a person under his direct spiritual charge to be stronger than that arising from any other relation.⁷⁵ There seems to have been also in *Norton v. Relly* (1764) 2 Eden, 286, the earliest reported case of this class, a considerable admixture of actual fraud and imposition.

A peculiar case is *Allcard v. Skinner* (1887) 36 Ch. Div. 145; 56 L. J. Ch. 1052. The plaintiff, a lady of full age, had joined a religious sisterhood, apparently of her own mere motion and free will. Its rules, known to her before she applied for admission, required the members to abandon all their individual property; not necessarily to the sisterhood, but the common practice was to give it to the superior for the purposes of the sisterhood. Other rules required strict obedience to the superior, restrained communication with "externs" about the affairs of the convent, and forbade members to "seek advice of any extern without the superior's leave." At various times after entering the sisterhood the plaintiff made transfers of considerable sums of money and stock to the superior, in fact,

purchasing or taking a lease from his principal, see also *Molony v. Kernan* (1842) 2 Dr. & W. 31; *Lord Selsey v. Rhoades* (1824-27) 2 Sim. & St. 41; 1 Bli. 1; 25 R. R. 150; 30 R. R. 1. In *Rossiter v. Walsh* (1843) 4 Dr. & W. 485; 65 R. R. 745, where the transaction was between an agent and a sub-agent of the same principals, the case was put by the bill (4 Dr. & W. 487), but not decided on the ground of fiduciary relation. See p. 482.

⁷⁴ In *Lyon v. Home* there was some evidence that the gifts in question were not asked for by the defendant but pressed on him by the plaintiff; but, given the circumstances, it was quite rightly held that this, if it were so, made no difference.

⁷⁵ 2 Giff. 269, 270.

"gave away practically all she could." After some years she left the sisterhood, and after nearly six years more she claimed the return of the funds remaining in the superior's hands. It was held that, having regard to the position of the plaintiff as a member of the sisterhood, and to the rules she had undertaken to obey, especially against communication with "externs," she was not a free agent at the time of making the gifts. But the majority of the Court held that her subsequent conduct amounted to confirmation.

A still later case where a weak rich man became a mere puppet in the hands of an amateur spiritual director, who used his ascendancy for the most grossly selfish ends, is *Morley v. Loughnan* [1893] 1 Ch. 736; 62 L. J. Ch. 515.

The authority of *Huguenin v. Baseley* (1807) 14 Ves. 273; 9 R. R. 276, as to this particular kind of influence, is to be found not in the judgment, which proceeds on the ground of confidential agency, but in Sir S. Romilly's argument in reply, to which repeated judicial approval has given a weight scarcely if at all inferior to that of the decision itself.

4. EVIDENCE

Circumstances held to amount to proof of undue influence, apart from any continuing relation.

In a case where a father gave security for the amount of certain notes believed to have been forged by his son, the holders giving him to understand that otherwise the son would be prosecuted for the felony, the agreement was set aside, as well on the ground that the father acted under undue pressure and was not a free and voluntary agent, as because the agreement was in itself illegal, as being substantially an agreement to stifle a criminal prosecution.⁷⁶

In *Ellis v. Barker*⁷⁷ the plaintiff's interest under a will was practically dependent as to part of its value on his being accepted as tenant of a farm the testator had occupied as yearly tenant. One of the trustees was the landlord's steward, and in order to induce the plaintiff to carry out the testator's supposed intentions of providing for the rest of the family he persuaded the landlord not to accept the plaintiff as his tenant unless he would make such an arrangement with the rest of the family as the trustees thought right. Under this pressure the arrangement was executed: it was practically a gift, as there was no real question as to the rights of the parties. Afterwards the deeds by which it was made were set aside at the suit of the plaintiff, and the trustees (having thus unjustifiably made themselves partisans as between their cestuis que trust) had to pay the costs.

These are the most distinct cases we have met with of a transaction being set aside on the ground of undue influence specifically proved to have been used to procure the party's consent to that particular transaction.⁷⁸

⁷⁶ *Williams v. Bayley* (1866) L. R. 1 H. L. 200; 35 L. J. Ch. 717; cp. p. 301. [See, too, *Mutual Finance, Ltd. v. Wetton & Sons, Ltd.* [1937] 2 K. B. 389; 106 L. J. K. B. 778.]

⁷⁷ (1871) L. R. 7 Ch. 104; 41 L. J. Ch. 64.

⁷⁸ *Cp. Ormes v. Bodel* (1860) 2 Giff. 166; 30 L. J. Ch. 1, revd. 2 D. F. J. 333; 128 R. R. 77, on the ground that the agreement had afterwards been voluntarily acted upon with a knowledge of all the facts.

In *Smith v. Kay*⁷⁹ a young man completely under the influence and control of another person and acting under that influence had been induced to execute securities for bills which he had accepted during his minority without any independent legal advice; and the securities were set aside. There was in this case evidence of actual fraud; but it was distinctly affirmed that the decision would have been the same without it, as it was incumbent on persons claiming under the securities to give satisfactory evidence of fair dealing.⁸⁰

This comes very near to the peculiar class of cases on "catching bargains" with which we shall deal presently.

Undue influence may be inferred when the benefit is such as the taker has no right to demand (*i.e.*, no natural or moral claim) and the grantor no rational motive to give.⁸¹

INADEQUACY OF THE CONSIDERATION

This, though in itself not decisive, may be an important element in the conclusion arrived at by a court of equity with respect to a contract of sale.

The general rule of equity in this matter was thus stated by Lord Westbury: "It is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition."⁸²

The established doctrine is that mere inadequacy of price is in itself of no more weight in equity than at law.⁸³ It is evidence of fraud, but, standing alone, by no means conclusive evidence.⁸⁴ Even when coupled with an incorrect statement of the consideration it will not be alone enough to vitiate a sale in the absence of any fiduciary relation between the parties.⁸⁵

But if there are other circumstances tending to show that the vendor was not a free and reasonable agent, the fact of the sale having been at an under-value may be a material element in determining the Court to set it aside. Thus it is when one mem-

⁷⁹ (1859) 7 H. L. C. 750; 115 R. R. 367.

⁸⁰ 7 H. L. C. 761, 770. The securities given were for an amount very much exceeding the whole of the sums really advanced and the interest upon them: *ib.* 778.

⁸¹ *Purcell v. M'Namara* (1807) 14 Ves. 91, 115.

⁸² *Tennent v. Tennents* (1870) L. R. 2 Sc. 6, 9. For a modern instance of such a conclusion being actually drawn by the Court from a sale at a gross undervalue, see *Rice v. Gordon* (1847) 11 Beav. 265, 270; 83 R. R. 153; *cp. Underhill v. Horwood* (1804) 10 Ves. at 219; *Summers v. Griffiths* (1866) 35 Beav. 27, 33; 147 R. R. 6, and the earlier dictum there referred to of Lord Thurlow in *Gwynne v. Heaton* (1778) 1 Bro. C. C. 1, 9, that "to set aside a conveyance there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it."

⁸³ *Wood v. Abrey* (1818) 3 Mad. 417, 423; 18 R. R. 264, 268; *Peacock v. Evans* (1809) 16 Ves. 512, 517; 10 R. R. 218, 222; *Stillwell v. Wilkins* (1821) Jac. 280, 282; 23 R. R. 56.

⁸⁴ *Cockell v. Taylor* (1851) 15 Beav. 103, 115; 21 L. J. Ch. 545; 92 R. R. 328, 336.

⁸⁵ *Harrison v. Guest* (1835) 6 D. M. G. 424; 8 H. L. C. 481; 106 R. R. 129.

ber of a testator's family conveys his interest in the estate to others for an inadequate consideration, and it is doubtful if he fully understood the extent of his rights or the effect of his act.⁸⁸ If property is bought at an inadequate price from an uneducated man of weak mind⁸⁹ or in his last illness,⁹⁰ who is not protected by independent advice, the burden of proof is on the purchaser to show that the vendor made the bargain deliberately and with knowledge of all the circumstances. Nay, more, when the vendor is infirm and illiterate and employs no separate solicitor, "it lies on the purchaser to show affirmatively that the price he has given is the value," and if he cannot do this the sale will be set aside at the suit of the vendor." In 1871 a case in the Court of Appeal was decided on the ground that "if a solicitor and mortgagee . . . obtains a conveyance [of the mortgaged property] from the mortgagor, and the mortgagor is a man in humble circumstances, without any legal advice, then the onus of justifying the transaction, and showing that it was a right and fair transaction, is thrown upon the mortgagee."⁹¹ Still more lately the poverty and ignorance of the seller of a reversionary interest has been held enough, without infirmity of body or mind, to throw the burden of proof on the buyer.⁹²

Similarly if a purchase is made at an inadequate price from vendors in great distress, and without any professional assistance but that of the purchaser's solicitors, "these circumstances are evidence that in this purchase advantage was taken of the distress of the vendors" and the conveyance will be set aside.⁹³

It has even been said that to sustain a contract of sale in equity "a reasonable degree of equality between the contracting parties" is required.⁹⁴ But such a dictum can be accepted only to this extent: that when there is a very marked inequality between the parties in social position or intelligence, or the transaction arises out of the necessities of one of them and is of such a nature as to put him to some extent in the power of the other, the Court will be inclined to give much more weight to any suspicious circumstances attending the formation of the contract, and will be much more exacting in its demands for a satisfactory explanation

⁸⁸ *Sturge v. Sturge* (1849) 12 Beav. 229; 19 L. J. Ch. 17; 85 R. R. 77; cp. *Dunnage v. White* (1818) 1 Swanst. 137, 150; 18 R. R. 33, 41.

⁸⁹ *Longmate v. Ledger* (1860) 2 Giff. 157, 163 (affirmed on appeal, see 4 D. F. J. 402); 128 R. R. 72.

⁹⁰ *Clark v. Malpas* (1862) 31 Beav. 80; 4 D. F. J. 401; 135 R. R. 312.

⁹¹ *Baker v. Monk* (1864) 33 Beav. 419; 4 D. J. S. 388, 391; 146 R. R. 361.

⁹² *Lord Hatherley C. Pries v. Coke* (1870-1) L. R. 6 Ch. 645, 649; though in general there is no rule against a mortgagee buying from his mortgagor; *Knight v. Majoribanks* (1849) 2 Mac. & G. 10; 83 R. R. 166; and see *Ford v. Olden* (1867) L. R. 3 Eq. 361; 36 L. J. Ch. 651.

⁹³ *Fry v. Lane* (1888) 40 Ch. D. 312; 58 L. J. Ch. 113.

⁹⁴ *Wood v. Abrey* (1818) 3 Mad. 417, 424; 18 R. R. 264, 269.

⁹⁵ *Longmate v. Ledger* (1860) 2 Giff. at 163, by Stuart V.-C.; cp. the same judge's remarks in *Barrett v. Hartley* (1866) L. R. 2 Eq. at 794. We have already seen something of the learned Vice-Chancellor's adventurous doctrines about Mistake. See the more correct statement in *Wood v. Abrey* (1818), 3 Mad. at 423; 18 R. R. 268. "A court of equity will inquire whether the parties really did meet on equal terms; and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress, it will avoid the contract."

of them, than when the parties are on such a footing as to be presumably of equal competence to understand and protect their respective interests in the matter in hand. The true doctrine is well expressed in the Indian Contract Act, s. 25, expl. 2. "An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given." A sale made by a person of inferior station, and for an inadequate price, was upheld by the Court of Appeal in Chancery, and ultimately by the House of Lords, when it appeared by the evidence that the vendor had entered into the transaction deliberately, and had deliberately chosen not to take independent professional advice.¹¹

It was long doubtful whether a degree of inadequacy of consideration which does not amount to evidence of fraud may not yet be a sufficient ground for refusing specific performance. The general rule as to granting specific performance, so far as it bears on this point, is that the Court has a discretion not to direct a specific performance in cases where it would be highly unreasonable to do so: it is also said that one cannot define beforehand what shall be considered unreasonable.¹² On principle it seems doubtful whether it should ever be considered unreasonable to make a man perform that which he has the present means of performing, and which with his eyes open he has bound himself to perform by a contract valid in law. And it is said in *Watson v. Marston*¹³ that the Court "must be satisfied that the agreement would not have been entered into if its true effect had been understood." Perhaps this may be considered to overrule those earlier decisions which furnish authority for refusing a specific performance simply on the ground of the apparent hardship of the contract. As to the immediate question whether inadequacy of consideration, not being such as to make the validity of the contract doubtful,¹⁴ is regarded as making the performance of it highly unreasonable within the meaning of the above rule, it is now settled by general consent in the negative. The opinions of Lord Eldon and Lord St. Leonards were clear.

"Unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance."¹⁵

"The undervalue must be such as to shock the conscience" (i.e. as to be sufficient evidence of fraud: cp. Lord Eldon's dictum).¹⁶

Sir Edward Fry already considered this to be "the well established principle of the Court" in the first edition of his well known treatise on Specific Performance published in 1858, and this is substantially repeated in the subsequent editions.¹⁷ There is just one modern case to the con-

¹¹ *Harrison v. Guest* (1855) 6 D. M. G. 424; 8 H. L. C. 481; 106 R. R. 129; cp. *Rosher v. Williams* (1875) L. R. 20 Eq. 210; 44 L. J. Ch. 419.

¹² See *Watson v. Marston* (1853) 4 D. M. G. 230, 239, 240; 102 R. R. 100, 107, and *dicta* there referred to.

¹³ Doubt as to the validity of the contract, short of the conclusion that it is not valid, has always been held a sufficient ground for refusing specific performance. Probably this arose from the habit or etiquette by which courts of equity, down to recent times, never decided a legal point when they could help it. Now that legal and equitable jurisdiction are united, the Court will consider the question of damages if an action for specific performance is brought in a case such that under the old practice the bill would have been dismissed without prejudice to an action: *Tamplin v. James* (1880) 15 Ch. Div. 215.

¹⁴ *Coles v. Trecothick* (1804) 9 Ves. 234, 246; 7 R. R. 167, 175, per Lord Eldon.

¹⁵ *Abbott v. Swooder* (1852) 4 De G. & Sm. 448, 461; 87 R. R. 439; per Lord St. Leonards.

¹⁶ 6th ed. 1921, by G. R. Northcote, 211—212.

trary, which is now left aside as an aberration. In that case there was something beyond mere inadequacy: the agreement was for a purchase at a valuation, and there was no valuation by a competent person. V.-C. Kindersley however expressed a distinct opinion that specific performance ought to be refused on the ground of inadequacy alone.¹ Sir Edward Fry's book or the earlier editions of the present work may be consulted, if desired, for a view of the older conflicting authorities, most of which were indecisive.

A brief notice of the French law on the head of *captation* (partly corresponding to our Undue Influence) will be found in the Appendix.²

FRAUD ON EXPECTANT HEIRS

We have still to deal with an important exceptional class of cases. That which may have been a discretionary inference when the discretion of courts of equity was larger than it now is has in these cases become a settled presumption, so that fraud, or rather undue influence, is "presumed from the circumstances and condition of the parties contracting."³ The term "fraud" is indeed of common occurrence both in the earlier⁴ and in the later authorities: but "fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions":⁴ and this does not come within the proper meaning of fraud, which is a misrepresentation (whether by untrue assertion, suppression of truth or conduct) made with the intent of creating a particular wrong belief in the mind of the party defrauded. Perhaps the best word to use would be "imposition" as a sort of middle term between fraud, to which it comes nearer in popular language, and compulsion, which it suggests by its etymology.

The class of persons in dealing with whose contracts the Court of Chancery went beyond its general principles are those who stand, in the words of Sir George Jessel, "in that peculiar position of reversioner or remainderman which is oddly enough described as an expectant heir. This phrase is used, not in its literal meaning, but as including every one who has either a vested remainder or a contingent remainder in a family property including a remainder in a portion, as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative. More than this, the doctrine as to expectant

¹ *Falcke v. Gray* (1859) 4 Drew. 651; 29 L. J. Ch. 28; 113 R. R. 493.

² Note 10, p. 571.

³ Lord Hardwicke in *Chesterfield v. Janssen* (1750-1) 2 Ves. Sr. at 125, classifies this in general terms as "a third kind of fraud": he proceeds (at 157) to make a separate head of catching bargains, as "mixed cases compounded of all or several species of fraud": but the phrase as to presumption is almost literally repeated, and it is obvious that these cases really come under his third head.

⁴ Per Lord Selborne, *Earl of Aylesford v. Morris* (1873) L. R. 8 Ch. 484, 491; 42 L. J. Ch. 546.

heirs has been extended to all reversioners and remaindermen, as appears from *Tottenham v. Emmet*⁵ and *Earl of Aylesford v. Morris*.⁶ So that the doctrine not only includes the class I have mentioned, who in some popular sense might be called expectant heirs, but also all remaindermen and reversioners.”

The Sales of Reversions Act, 1867 (31 & 32 Vict. c. 4; now repealed, see p. 492), modified the practice of the Court of Chancery (which now continues in the Chancery Division) less than might be supposed: it is therefore necessary to give in the first place a connected view of the whole doctrine as it formerly stood. It was considered that persons raising money on their expectancies were at such a disadvantage as to be peculiarly exposed to imposition and fraud, and to require an extraordinary degree of protection: “and it was also thought right to discourage such dealings on a general ground of public policy, as tending to the ruin of families” and in most cases involving “a sort of indirect fraud upon the heads of families from whom these transactions are concealed.”¹⁰

Moreover laws against usury were in force at the time when courts of equity began to give relief against these “catching bargains” as they are called;¹¹ any transactions which looked like an evasion of those laws were very narrowly watched, and it may be surmised that when they could not be brought within the scope of the statutes the Courts felt justified in being astute to defeat them on any other grounds that could be discovered.¹²

REVERSIONARY INTERESTS

The doctrine which was at first introduced for the protection of expectant heirs was in course of time extended to all dealings whatever with reversionary interests. In its finally developed form it had two branches:—

⁵ (1865) 14 W. R. 3; 141 R. R. 804. ⁶ (1873) L. R. 8 Ch. 484; 42 L. J. Ch. 564.

⁷ *Beynon v. Cook* (1875) L. R. 10 Ch. 391, n.

⁸ “A degree of protection approaching nearly to an incapacity to bind themselves by any contract”: Sir W. Grant in *Peacock v. Evans* (1809) 16 Ves. at 514; 10 R. R. 218, 220.

⁹ *Twistleton v. Griffiths* (1716) 1 P. Wms. at 312; *Cole v. Gibbons*, 3 P. Wms. at 293; *Chesterfield v. Janssen* (1750-1) 2 Ves. Sr. at 159.

¹⁰ Per Lord Selborne, *Earl of Aylesford v. Morris* (1873) L. R. 8 Ch. 484, 492; 42 L. J. Ch. 546; *Chesterfield v. Janssen* (1750-1) 2 Ves. Sr. 124, 157.

¹¹ In *Wiseman v. Beake*, 2 Vern. 121, it appears from the statement of the facts that twenty years or thereabouts after the Restoration this jurisdiction was regarded as a novelty: for the defendants’ testator “understanding that the Chancery began to relieve against such bargains” took certain steps to make himself safe, but without success, the Court pronouncing them “a contrivance only to double hatch the cheat.” But in *Ardglasse v. Muschamp* (1684) 1 Vern. 238, it is said that many precedents from Lord Bacon’s, Lord Ellesmere’s and Lord Coventry’s times were produced.

¹² The reports of the cases on this head anterior to *Chesterfield v. Janssen* are unfortunately so meagre that it is difficult to ascertain whether they proceeded on any uniform principle. But the motives above alleged seem on the whole to have been those which determined the policy of the Court. On the gradual extension of the remedy, cp. the remarks of Burnett J. in *Chesterfield v. Janssen* (1750-1) 2 Ves. Sr. at 145.

1. As to reversionary interests, whether the reversioner were also an expectant heir or not:

- A. The rule of law that the vendor might avoid the sale for undervalue alone;
- B. The rule of evidence that the burden of proof was on the purchaser¹⁵ to show that he gave the full value.

It is this part of the doctrine that was changed by the Act 31 Vict. c. 4 (now repealed, see below).

2. As to "catching bargains" with expectant heirs and remaindermen or reversioners in similar circumstances, *i.e.*, bargains made in substance on the credit of their expectations, whether the property in expectancy or reversion be ostensibly the subject-matter of the transaction or not:¹⁶

The rule of evidence that the burden of proof lies on the other contracting party to show that the transaction was a fair one. We use the present tense, for neither the last-mentioned Act nor the repeal of the usury laws, as we shall see presently, has made any change in this respect.

The part of the doctrine which is abrogated was intimately connected both in principle and in practice with that which remains; and though it seems no longer necessary to go through the authorities in detail, it may still be advisable to give some account of the manner in which it was applied.¹⁶

The general rule established by the cases was that the purchaser was bound to give the fair market price, and to preserve abundant evidence of the price having been adequate, however difficult it might be to ascertain what the true value was. It was applied to reversionary interests of every kind, and the vendor was none the less entitled to the benefit of it if he had acted with full deliberation. The presumption originally thought to arise from transactions of this kind had in fact become transformed into an inflexible rule of law, which, consistently carried out, made it well-nigh impossible to deal with reversionary interests at all. The modern cases almost look as if the Court, finding it too late to shake off the doctrine, had sought to call the attention of the legislature to its inconvenience by extreme instances. Sales were set aside after the lapse of such a length of time as 19 years, and even 40 years.¹⁶ A sub-purchaser who bought at a considerably advanced price was held by this alone to have notice of the first sale having been an undervalue.¹⁷ In one case where the price paid was 200*l.*, and the true value as estimated by the Court 238*l.*, the sale was set aside on the ground of this undervalue, though the question was only incidentally raised and the plaintiff's case failed on all other points.¹⁸

Finally Parliament found it necessary to interfere, and in 1867, by the Sales of Reversions Act (31 Vict. c. 4), now repealed and re-enacted by the Law of Property Act, 1925 (15 Geo. 5,

¹⁵ Including mortgagor: *Emmet v. Tottenham* (1864) 10 Jur. N. S. 1090; 141 R. R. 804.

¹⁶ *Earl of Aylesford v. Morris* (1873) L. R. 8 Ch. at 497.

¹⁷ A digest of the cases was given in the first two editions (550, 2nd ed.).

¹⁸ *St. Albyn v. Harding* (1859) 27 Beav. 11; *Salter v. Bradshaw* (1858) 26 Beav. 161; 122 R. R. 68.

¹⁷ *Nesbitt v. Berridge* (1863) 32 Beav. 280, revd., 4 D. J. S. 45; 146 R. R. 215.

¹⁸ *Jones v. Ricketts* (1862) 31 Beav. 130; 31 L. J. Ch. 753.

c. 20), s. 174, it was enacted (s. 1) that no purchase (defined by s. 2 to include every contract, &c., by which a beneficial interest in property may be acquired), made *bona fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate, should after January 1, 1868 (s. 3), be opened or set aside merely on the ground of under value. The Act was carefully limited to its special object of putting an end to the arbitrary rule of equity which was an impediment to fair and reasonable as well as to unconscionable bargains. It left undervalued still a material element in cases in which it is not the sole equitable ground for relief.¹⁹

It had already been decided²⁰ that the repeal of the usury laws²¹ did not alter the general rules of the Court of Chancery as to dealings with expectant heirs. This decision was followed in *Miller v. Cook*,²² and adhered to in *Tyler v. Yates*²³ and lastly in *Earl of Aylesford v. Morris*²⁴ and *Beynon v. Cook*²⁵ and in the two latter cases it has been clearly laid down that the rules are in like manner unaffected by the change in the law concerning sales of reversions. And this was confirmed by all the opinions delivered in *O'Rorke v. Bolingbroke*²⁶ in the House of Lords, though the particular transaction in dispute was upheld.

RULES AS TO "CATCHING BARGAINS"

The effect of these rules is not to lay down any proposition of substantive law, but to make an exception from the ordinary rules of evidence by throwing upon the party claiming under a contract the burden of proving not merely that the essential requisites of a contract, including the other party's consent, existed, but also that the consent was perfectly free. The question is therefore, what are "the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it."²⁷ Now these conditions have never

¹⁹ *Earl of Aylesford v. Morris* (1873) L. R. 8 Ch. at 490. See also *O'Rorke v. Bolingbroke* (1877) 2 App. Ca. 814; *Fry v. Lane* (1888) 40 Ch. D. 312; 58 L. J. Ch. 113.

²⁰ *Croft v. Grahame* (1863) 2 D. J. S. 155; 139 R. R. 71.

²¹ 17 & 18 Vict. c. 90. Partial exceptions had been made by earlier Acts which it now seems useless to mention.

²² (1870) L. R. 10 Eq. 641; 40 L. J. Ch. 11.

²³ (1871) L. R. 11 Eq. 265; L. R. 6 Ch. 665; 40 L. J. Ch. 768.

²⁴ (1871), L. R. 8 Ch. 484; this may now be regarded as the leading case on the subject. It should be observed that in *Tyler v. Yates*, *ante*, n. 23, a principal and surety made themselves liable for a bill which the principal had accepted during his minority, without knowing that there was no existing legal liability on the bill, and all the subsequent transactions were bound up with this: and the case was rested on this ground in the Court of Appeal (at 671). Cp. on this point *Coward v. Hughes* (1855) 1 K. & J. 443; 103 R. R. 172, where a widow who during her husband's life had joined as surety in his promissory note executed a new note under the impression that she was liable on the old one, and without any new consideration, and the note was set aside; see *Southall v. Rigg* (1851) and *Forman v. Wright* (1851) 11 C. B. 481; 20 L. J. C. P. 145; 87 R. R. 731.

²⁵ (1875) L. R. 10 Ch. 389.

²⁶ (1877) 2 App. Ca. 814.

²⁷ *Earl of Aylesford v. Morris* (1873) L. R. 8 Ch. at 492.

been fixed by any positive authority. We have seen that the Court of Chancery has refused to define fraud, or to limit by any enumeration the standing relations from which influence will be presumed. In like manner there is no definition to be found of what is to be understood by a "catching bargain." This being so we can only observe the conditions which have in fact been generally present in the exercise of this jurisdiction. These are:—

(i) A loan in which the borrower is a person having little or no property immediately available, and is trusted in substance on the credit of his expectations.

Obs. It is immaterial whether there is or not any actual dealing with the estate in remainder or expression of the contingency on which the fund for payment of the principal advanced substantially depends: *Earl of Aylesford v. Morris* (1873) L. R. 8 Ch. at 497. It is also immaterial whether any particular property is looked to for ultimate payment. A general expectation derived from the position in society of the borrower's family, the lender intending to trade on their probable fear of exposure, may have the same effect: *Nevill v Snelling* (1880) 15 Ch. D. 679, 702; 49 L. J. Ch. 777 (Denman J.).

(ii) Terms *primâ facie* oppressive and extortionate (*i.e.*, such that a man of ordinary sense and judgment cannot be supposed likely to give his free consent to them).

Obs. An excessive rate of interest is in itself nothing more than a disproportionately large consideration given by the borrower for the loan: and it is not sufficient, standing alone, to invalidate a contract in equity: *Webster v Cook* (1867) L. R. 2 Ch. 542, where a loan at 60 per cent. per annum was upheld. Stuart V.-C. disapproved of the case in *Tyler v Yates* (1871) L. R. 11 Eq. at 276, but on another point. And see *Parker v Butcher* (1867) L. R. 3 Eq. 762, 767; 36 L. J. Ch. 552.

(iii) A considerable excess in the nominal amount of the sums advanced over the amount actually received by the borrower.

Obs. This appears in all modern cases in which relief has been given: deductions being made on every advance, according to the common practice of professed moneylenders, under the name of discount, commission, and the like. The result is that the rate of interest appearing to be taken does not show anything like the terms on which the loan is in truth made: and this may be considered evidence of fraud so far as it argues a desire on the part of the lender to glose over the real terms of the bargain. A jury could, perhaps, not be directed so to consider it in a trial where fraud was distinctly in issue; though no doubt such circumstances, or even an exorbitant rate of interest, would be made matter of observation.

(iv) The absence of any real bargaining between the parties or of any inquiry by the lender into the exact nature or value of the borrower's expectations.

Obs. These circumstances were relied on in *Earl of Aylesford v Morris* (1873) L. R. 8 Ch. at 496, as increasing the difficulty of upholding the transaction: cp. *Nevill v Snelling* (1880) 15 Ch. D. at 702-3. This again is the usual practice of the moneylenders who do this kind of business. Their terms are calculated to cover the risk of there being no security at all; moreover the borrower often wishes the lender not

to make any inquiries which might end in the matter coming to the knowledge of the ancestor or other person from whom the expectations are derived. The concealment of the transaction from the ancestor was held by Lord Brougham in *King v Hamlet* (1835) 2 M. & K. 456: 39 R. R. 24, 327, to be an indispensable condition of equitable relief; but this opinion is not now accepted: *Earl of Aylesford v Morris* (1873) L. R. 8 Ch. at 491. The decision in *King v Hamlet* (affirmed in the House of Lords, but without giving any reasons, 3 Cl. & F. 218; 39 R. R. 24) can be supported on the ground that the party seeking relief had himself acted on the contract he impeached so as to make restitution impossible.

It seems safe to assert that in any case where these conditions concur the burden of proof is thrown on the lender to show that the transaction was a fair one: it seems equally unsafe to assert that they must all concur, or that any one of them (except perhaps the first) is indispensable.

It may then be asked, By what sort of evidence is the lender to satisfy the Court that the borrower was not imposed on? As there is no reported case in which it was considered that the burden of proof lay upon the lender, and yet he did so satisfy the Court, it is impossible to give any certain answer to this question. It is evidently most improbable that in any case where the above-mentioned conditions are present, any satisfactory evidence should be forthcoming to justify the lender.²⁸ Practically the question is whether in the opinion of the Court the transaction was a hard bargain²⁹—that is, not merely a bargain in which the consideration is inadequate, but an unconscionable bargain where one party takes an unfair advantage of the other.³⁰ This jurisdiction is of considerable importance in British India and especially in the United (formerly North-West) Provinces, which have furnished an interesting line of cases.³¹

An account stated for the purpose of a contract of this description is of no more validity than the contract itself, and a recital of it in the security does not preclude the borrower from re-opening the account even as against purchasers or sub-mortgagees of the original lender who have notice of the general character of the transaction. For such notice is equivalent to notice of all the legal consequences.³²

²⁸ "No attempt has been made to show by any independent evidence (if such a thing could be conceived possible) that the terms thus imposed on the plaintiff were fair and reasonable": L. R. 8 Ch. 496.

²⁹ See the judgment of the M.R. *Beynon v. Cook* (1875) L. R. 10 Ch. 391, n., and *Nevill v. Snelling* (1880) 15 Ch. D. at 703.

³⁰ Per Jessel M.R. in *Middleton v. Brown* (1878) 47 L. J. Ch. 411, C. A.; *Nevill v. Snelling* (1880) 15 Ch. D. 679; 49 L. J. Ch. 777, where the lender systematically took advantage of a mistaken over-payment of interest by the borrower.

³¹ See *Kunwar Ram Lal v. Nil Kanth* (1893) L. R. 20 Ind. App. 112; *Rajah Mokham Singh v. Rajah Rup Singh*, *ib.* 127, and cp. p. 314, note ²⁸, the present writer's Law of Fraud, &c., in British India (Tagore Law Lectures 1893-4), 77-79, and I. C. A. s. 16 (3) and notes thereon in ed. Pollock and Mulla.

³² *Tottenham v. Green* (1863) 32 L. J. Ch. 201; 139 R. R. 326: a case decided under the old rule as to dealings with reversionary interests, but the principles seem applicable in all cases where the burden of proof is still on the lender.

The borrower who seeks relief against a contract of this description must of course repay whatever sums have been actually advanced, with reasonable interest (according to the present practice of the Court, usually 4 per cent.), and the relief is granted only on those terms. Moreover it is held not unjust that he should obtain it at his own expense, since he calls in the assistance of the Court to undo the consequences of his own folly:³³ and accordingly the general rule is to give no costs on either side.³⁴

The rule of evidence casting a special burden of proof on the lender being peculiar to equity, there was generally no defence at law to an action brought by him to enforce a contract of this kind. But since the rule of evidence established in equity now prevails in every branch of the High Court, it seems that when a lender of money (not being a moneylender within the Acts to be presently mentioned, which protect borrowers quite otherwise) sues on a special contract, whether the contract be embodied in a negotiable instrument or not, and the borrower proves facts which bring the contract within the description of a "catching bargain" as understood by courts of equity, the lender must prove the reasonableness of the bargain; and if he fails to do so, he cannot recover on the special contract, but can recover his principal and reasonable interest as on a common count for money lent. This, however, is now of but little practical importance; and the importance of this class of cases is also diminished by the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), which makes loans of money to infants absolutely void and forbids any action to be brought on a promise to pay debts contracted during infancy. See p. 51.

MONEYLENDERS ACTS

The Moneylenders Acts, 1900 (63 & 64 Vict. c. 51) to 1927 (17 & 18 Geo. 5, c. 21), impose special burdens on professional moneylenders³⁵ by way of registration, licensing, and otherwise, and enable the Court to set aside any terms which it considers "harsh and unconscionable" (the question being for the judge and not the jury),³⁶ with being bound by the former practice of courts of equity.³⁷ Excessive interest alone may be a sufficient

³³ *Earl of Aylesford v. Morris* (1873) L. R. 8 Ch. at 499.

³⁴ In the cases of sales of reversions under the former law on that head the practice was for some time to treat the suit as a redemption suit, and give the purchaser his costs as a mortgagee: but the later rule was to give no costs on either side, subject to exceptions for such special circumstances as unfounded charges of fraud by the borrower or refusal by the lender of principal with reasonable interest offered before trial. Reference to the cases is now omitted as of no practical use.

³⁵ As to the persons within this description, *Litchfield v. Dreyfus* [1906] 1 K. B. 535; 75 L. J. K. B. 447; *Edgelow v. MacElwee* [1918] 1 K. B. 205; 87 L. J. K. B. 738. So far as any test can be assigned, it is readiness to lend money in a distinct way of business: occasional loans incidental to another business, or to genuine personal acquaintance, do not make a man a moneylender.

³⁶ *Abrahams v. Dimmock* [1915] 1 K. B. 662; 84 L. J. K. B. 802, C. A.

³⁷ *Re a Debtor* [1903] 1 K. B. 705; 72 L. J. K. B. 382, C. A.; *Samuel v. Newbold* [1906] A. C. 461; 75 L. J. Ch. 705.

ground for relief;" the question of excess is for the judge." The decisions on the Acts are now numerous; they illustrate no principle and nothing less than a complete collection of them will serve in practice. It is therefore thought useless to enter on details here."

ANALOGOUS TRANSACTIONS

The same equitable principles apply, so far as they are applicable to a transaction of sale as distinguished from loan, to the sale of reversionary interests by persons who are not in an independent position, as when the sale is made by a man only just of age in pursuance of terms settled while he was still an infant. Here the burden is on the purchaser to show the fairness of the transaction. He is not bound to show that the price given was absolutely adequate; but he is bound, notwithstanding the Sales of Reversions Act, 1867 (31 Vict. c. 4, p. 492), to show that it was such as, upon the facts known to him at the time, he might have reasonably thought adequate. Moreover he ought to see, where practicable, that the seller has independent legal advice. These rules seem to be established by *O'Rorke v. Bolingbroke*,³⁹ which is remarkable as an almost singular instance of an impeached transaction with an "expectant heir" being upheld. There a father and son negotiated with a purchaser for the sale of the son's reversionary interest expectant on the death of the father. The sale was completed three weeks after the son came of age. The price was agreed to after some bargaining; it was founded on a statement of value furnished by a third person, and would have been adequate if the father's life had been a good one. The purchaser did not know and had no reason to believe anything to the contrary, but it was in fact a bad life. The young man took no independent advice, being "penniless, and except for his father friendless."⁴¹ The father died within three months after the sale. Four years later the son sued to have the whole transaction set aside, but failed in the House of Lords after succeeding in the Court of Appeal in Ireland. The majority of the Lords⁴² held that the burden of proof was indeed on the buyer, but that he had satisfied it. In some cases unconscionable bargains of this kind are complicated with champerty. Where this is so the transaction cannot, of course, be upheld.⁴³

³⁹ *Samuel v. Newbold*, last note : see now s. 10 of the Act of 1927.

³⁹ The requirements of the Acts are strictly enforced : see *Merz v. South Wales Equitable Money Society* [1927] 2 K. B. 366 ; 96 L. J. K. B. 1020, C. A. Even a borrower's consent to judgment in an action by the lender is not conclusive : *Mills Conduit Investment, Ltd. v. Leslie* [1932] 1 K. B. 233 ; 100 L. J. K. B. 685, full C. A.

⁴⁰ (1877) 2 App. Ca. 814. Cp. *Fry v. Lane* (1888) 40 Ch. D. 312 ; 58 L. J. Ch. 113, where the seller was poor and ignorant, and the same solicitor purported to act for both parties.

⁴¹ Lord Blackburn, 2 App. Ca. at 837.

⁴² Lord Blackburn, Lord O'Hagan, and Lord Gordon, diss. Lord Hatherley.

⁴³ *Rees v. De Bernady* [1896] 2 Ch. 437 ; 65 L. J. Ch. 656.

"SURPRISE"

Another alleged ground of equitable relief against contracts founded on the notion of an inequality between the contracting parties has been "surprise," or "surprise and improvidence." But this seems to be only a way of describing evidence of fraud or of a relation of dependence between the parties.

The case of *Evans v. Llewellyn*⁴⁴ may be taken as the typical instance. The plaintiff was a person of inferior station and education who acquired by descent a title in fee simple to a share in land in which the defendant had a limited interest. His title was first communicated to him by the defendant, who represented to him (as the fact appears to have been) that the circumstances of the family created a moral obligation in the plaintiff not to insist on his strict rights, and offered to purchase his interest for a substantial though not adequate consideration. The defendant suggested to the plaintiff to consult his friends in the matter, which however he did not do. Three days intervened between the first interview and the conclusion of the business by the acceptance of the defendant's offer. It was considered that the plaintiff was under the circumstances not a free agent and not equal to protecting himself, and was taken by surprise, and the sale was set aside.⁴⁵ The case seems somewhat anomalous, but, according to very high authority, it might still be followed in setting aside a contract as "improvident and hastily carried into execution,"⁴⁶ and it has been distinctly approved in the Court of Appeal in Chancery.⁴⁶ But no judicial authority can make "surprise" or "improvidence" a word of art, or bind lawyers to affirm as a general proposition that haste or imprudence can of itself be a sufficient cause for setting aside a contract, or even that there is any particular degree of haste or imprudence from which fundamental error, fraud, or undue influence, will be invariably presumed. "The Court will not measure the degrees of understanding."⁴⁷ "Surprise" and "improvidence" are matters from which it may be inferred, as a fact in particular cases, that there was no true consent, or that the consent was not free. What is recorded in such a case as *Evans v. Llewellyn*⁴⁸ is not an enunciation of law, but an inference of fact which may be useful in the way of analogy but it is not binding as an authority. To this effect,

⁴⁴ (1787) 2 Bro. C. C. 150 ; 1 Cox, 333 ; 1 R. R. 49, a fuller report, which is here followed ; the other if correct would reduce it to a plain case of fraud or at all events misrepresentation. In *Haygarth v. Wearing* (1871) L. R. 12 Eq. 320 ; 40 L. J. Ch. 577, which to some extent resembled this, the ground of the decision was a positive misrepresentation as to the value of the property.

⁴⁵ Lord St. Leonards in *Curson v. Belworthy* (1852) 3 H. L. C. 742 ; 88 R. R. 319 ; there the appellant relied on express charges of fraud, which were not made out ; but Lord St. Leonards thought he might possibly have succeeded if he had rested his case on the ground suggested.

⁴⁶ Per Turner L.J. in *Baker v. Monk* (1864) 4 D. J. S. 388, at 392 ; 146 R. R. 361.

⁴⁷ *Bridgman v. Green* (1755) Wilmot, 58, 61.

⁴⁸ (1787) 1 Cox, 333 ; 1 R. R. 49.

indeed, were the observations of the judges in the *Earl of Bath and Mountague's* case as long ago as 1693.⁵⁰ In that case Baron Powel said (3 Ch. Ca. at 56):

"It is said, This is a Deed that was obtained by Surprize and Circumvention. Now I perceive this word Surprize is of a very large and general Extent. . . . I hardly know any Surprize that should be sufficient to set aside a Deed after a Verdict, unless it be mixed with Fraud, and that expressly proved." (*I.e.* the verdict in favour of the deed precludes the party from asserting in equity that he did not know what he was about: for he should have set up that case at law on the plea of *non est factum*.) "It must be admitted that there was Deliberation, and Consideration and Intention enough proved to make it a good Deed at Law, otherwise there would not have been a Verdict for it": per L. C. J. Treby, *ib.* at 74.

The judgment of the Lord Keeper Somers is even more decided, and points out clearly the difference between an instrument which is void both at law and in equity, and one which is voidable in equity (p. 114):—

"It is true, it is charged in the Bill that this Deed was obtained by Fraud and Surprize. . . . But whosoever reads over the Depositions will see that the End they aimed at was to attack the Deeds themselves as false Deeds, and not truly executed; but that being tried at Law, and the Will and Deeds verified by a verdict, the Counsel have attempted to make use of the same Evidence, and read it all, or at least the greatest Part of it, as Evidence of Surprize and Circumvention. . . .

"Now, for this word (Surprize) it is a Word of a general Signification, so general and so uncertain, that it is impossible to fix it; a Man is surpriz'd in every rash and indiscreet Action, or whatsoever is not done with so much Judgment and Consideration as it ought to be: But I suppose the Gentlemen who use that Word in this Case mean such Surprize as is attended and accompanied with Fraud and Circumvention; such a Surprize indeed may be a good ground to set aside a Deed so obtain'd in Equity and hath been so in all Times; but any other Surprize never was and I hope never will be, because it will introduce such a wild Uncertainty in the Decrees and Judgments of the Court, as will be of greater Consequence than the Relief in any Case will answer for."

Moreover the doctrine thus stated is exactly analogous to the undoubted law concerning inadequacy of consideration. The value of the subject-matter of a contract, and therefore the adequacy of the consideration, which depends on it, is in most cases easier to measure than the degree of deliberation or prudence with which the contract was entered into.

5. LIMITS OF THE RIGHT OF RESCISSION

The right of setting aside a contract or transfer of property voidable on the ground of undue influence is analogous to the right of rescinding a transaction voidable on any other ground, and follows the same rules with some slight modifications in detail.

What is said in the last chapter of rescinding contracts for fraud

⁵⁰ 3 Ch. Ca. 55. Cp. Story, Eq. Jurisp. § 251.

or misrepresentation may be taken as generally applicable here. We proceed to give some examples of the special application of the principles.

The right to set aside a gift or beneficial contract voidable for undue influence may be exercised by the donor's representatives or successors in title⁵¹ as well as by himself, and against not only the donee but persons claiming through him⁵² otherwise than as purchasers for value without notice.⁵³ But the jurisdiction is not exercised at the suit of third persons. The Court will not refuse, for example, to pay a fund, at the request of a petitioner entitled thereto, to the trustees of a deed of gift previously executed by the petitioner, because third parties suggest that the gift was not freely made.⁵⁴

On the other hand it is not necessary to the support of a claim to set aside a contract on the ground of undue influence to show that the influence was directly employed by another contracting party. It is enough to show that it was employed by some one who expected to derive benefit from the transaction, and with the knowledge of the other party or under circumstances sufficient to give notice of it. The most frequent case is that of an ancestor or other person *in loco parentis* inducing a descendant, &c., to give security for a debt of the ancestor. But if the other party does all he reasonably can to guard against undue influence being exerted (as by insisting on the person in a dependent position having independent professional advice), and the precautions he demands are satisfied in a manner he cannot object to at the time, the contract cannot as against him be impeached.⁵⁵

It appears to be at least doubtful whether a contract can be set aside on the ground of influence exerted on one of the parties by a stranger to the contract who did not expect to derive any benefit from it:⁵⁶ except where the contract is an arrangement between cestuis que trust claiming under the same disposition, and the trustee puts pressure on one of the parties to make concessions; the ground in this case being the breach of a trustee's special duty to act impartially.⁵⁷

⁵¹ *E.g.* Executor: *Hunter v. Atkins* (1832-4) 3 M. & K. 113; 41 R. R. 30; *Coutts v. Acworth* (1869) L. R. 8 Eq. 558. Assignee in bankruptcy: *Ford v. Olden* (1867) L. R. 3 Eq. 461; 36 L. J. Ch. 651. Devisee: *Gresley v. Mousley* (1861) 4 De G. & J. 78. Heir: *Holman v. Loynes* (1854) 4 D. M. G. 270; 23 L. J. Ch. 529; 102 R. R.

1 v. *Baseley* (1807) 14 Ves. 273, 289; 9 R. R. 276, 286. Cp. *Molony v. Kernan* (1842) 2 Dr. & W. 31, 40; 59 R. R. 635.

⁵² *Cobbett v. Brock* (1855) 20 Beav. 524, 528; 109 R. R. 523.

⁵³ *Metcalfe's trust* (1864) 2 D. J. S. 122; 33 L. J. Ch. 308; 139 R. R. 58.

⁵⁴ Compare *Cobbett v. Brock* (1855) 20 Beav. 524; 109 R. R. 523, with *Berdoe v. Dawson* (1865) 34 Beav. 603; 145 R. R. 693. As to what amounts to notice, *Maitland v. Backhouse* (1847) 16 Sim. 58; *Tottenham v. Green* (1863) 32 L. J. Ch. 201; 139 R. R. 326.

⁵⁵ *Bentley v. Mackay* (1862) 31 Beav. 143, 151 (this point not dealt with on appeal). On principle the answer should clearly be in the negative as regards contracts. With gifts pure and simple, as to which there may be some doubt, we are not now concerned.

⁵⁷ *Ellis v. Barker* (1871) L. R. 7 Ch. 104; 41 L. J. Ch. 64.

The right to set aside a contract or gift originally voidable on the ground of undue influence may be lost by express confirmation⁶⁰ or by delay amounting to proof of acquiescence.⁶¹ But any subsequent confirmation will be inoperative if made in the same absence of independent advice and assistance which vitiated the transaction in the beginning.⁶² "Frauds or impositions of the kind practised in this case cannot be condoned; the right to property acquired by such means cannot be confirmed in this Court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and an absolute release from the undue influence by means of which the frauds were practised. To make a confirmation or compromise of any value in this Court the parties must be at arm's length, on equal terms, with equal knowledge, and with sufficient advice and protection."⁶³ And delay which can be accounted for as not unreasonable in all the circumstances is no bar to relief.⁶⁴ In short, an act, "the effect of which is to ratify that which in justice ought never to have taken place" ought to stand only upon the clearest evidence.⁶⁵ The effect of delay on the part of the person seeking relief is also subject to a special limitation. In a case between solicitor and client, or parties standing in any other confidential relation, less weight is given to the lapse of time than is due to it when no such relation subsists,⁶⁶ and it is of special importance that the confirming party should not only be fully acquainted with his or her rights but have independent advice.⁶⁷

In the case of a deliberate confirmation after the relation of influence has ceased to exist, it need not be shown that the donor knew the gift to be voidable: "otherwise where the alleged confirmation is connected with the original transaction and takes place under similar circumstances."

⁶⁰ *Sump v. Gaby* (1852) 2 D. M. G. 623; 22 L. J. Ch. 352; 95 R. R. 257; *Morse v. Royal* (1806) 12 Ves. 355; 8 R. R. 338.

⁶¹ *Wright v. Vanderplank* (1856) 8 D. M. G. 133, 147; 25 L. J. Ch. 753; 114 R. R. 60; *Turner v. Collins* (1871) L. R. 7 Ch. 320; 41 L. J. Ch. 558; *Allcard v. Skinner* (1887) 36 Ch. Div. 145; see especially per Lindley L.J. at 187. Cp. *Nutt v. Easton* [1899] 1 Ch. 873; 68 L. J. Ch. 367; affd. [1900] 1 Ch. 29; 69 L. J. Ch. 46, where the plaintiff's case also failed on other grounds.

⁶² *Savery v. King* (1856) 5 H. L. C. at 664; 25 L. J. Ch. 482; 101 R. R. 323.

⁶³ *Moxon v. Payne* (1873) L. R. 8 Ch. 881, 885; 43 L. J. Ch. 240. And a confirmation will not be helped by the presence of an independent adviser of the party confirming, if, in consequence of the continuing influence of the other party, his advice is in fact disregarded: *ib.*

⁶⁴ *Kempson v. Ashbee* (1874) L. R. 10 Ch. 15; 44 L. J. Ch. 195.

⁶⁵ *Morse v. Royal* (1806) 12 Ves. at 374; 8 R. R. at 341.

⁶⁶ *Gresley v. Mousley* (1861) 4 De G. & J. 78, 96; 28 L. J. Ch. 620; 124 R. R. 164. But even in a case between solicitor and client a delay of eighteen years has been held fatal: *Champion v. Rigby* (1830) 1 Russ. & M. 539; 31 R. R. 107.

⁶⁷ *Barron v. Willis* [1900] 2 Ch. 121, 137; 69 L. J. Ch. 532, C. A. (in H. L. on broader grounds [1902] A. C. 271; 71 L. J. Ch. 609).

⁶⁸ *Mitchell v. Homfray* (1881) 8 Q. B. Div. 587; 50 L. J. Q. B. 460. In *Tomson v. Judge* (1885) 3 Drew. 306; 106 R. R. 362, there was not independent advice, and there was an attempt to conceal the real character of the transaction. But the considered opinion of Kindersley V.-C. on the general principle is doubtless a weighty one.

⁶⁹ *Kempson v. Ashbee* (1874) L. R. 10 Ch. 15; 44 L. J. Ch. 195.

An adoption of the instrument impeached for a particular purpose (as by the exercise of a power contained in it) may operate as an absolute confirmation of the whole."⁶⁸

It seems that the presumption of influence arising from confidential relations is not to be extended to cases where a merely trifling benefit is conferred."⁶⁹ This is more than a simple application of the maxim *De minimis non curat lex*, for the transaction brought in question might be in itself of great magnitude and importance, though the advantage gained by one party over the other were not large. Indeed the case to which this principle seems most likely to be applicable is that of a transaction not of a commercial nature, and on such a scale that the parties, dealing fairly and deliberately, might choose not to be curious in weighing a comparatively small balance of profit or loss.

⁶⁸ *Jarratt v. Aldam* (1870) L. R. 9 Eq. 463 ; 39 L. J. Ch. 349.

⁶⁹ Per Turner L. J. *Rhodes v. Bate* (1866) L. R. 1 Ch. at 258 ; and *Lindley L. J. Allcard v. Skinner* (1887), 36 Ch. Div. at 185.

13

AGREEMENTS OF IMPERFECT OBLIGATION

UNDER this head we propose to deal with topics of a miscellaneous kind as regards their subject-matter and forming anomalies in the general law of contract, but presenting in those anomalies some remarkable uniformities and analogies of their own.

Between contracts which can be actively enforced by the persons entitled to the benefit of them, and agreements or promises which are not recognized as having any legal effect at all, there is another class of agreements which though they confer no right of action are recognized by the law for other purposes. These may be called agreements of imperfect obligation.¹ Some writers (as Pothier) speak of imperfect obligations in the sense of purely moral duties which are wholly without the scope of law: and what we here call Imperfect Obligations are in the civil law called Natural Obligations. But this term, the use of which in Roman law is intimately connected with the distinction between *ius civile* and *ius gentium*,² would be inappropriate in English.³

Where there is a perfect obligation, there is a right coupled with a remedy, *i.e.*, an appropriate process of law by which the authority of a competent court can be set in motion to enforce the right.

Where there is an imperfect obligation, there is a right without a remedy. This is an abnormal state of things, making an exception whenever it occurs to the general law expressed in the maxim *Ubi ius ibi remedium*; and it can be produced only by the operation of some special rule of positive law. Such rules may operate in the following ways to produce an imperfect obligation:

1. By way of condition subsequent, taking away a remedy which once existed.
2. By imposing special conditions as precedent to the existence of the remedy.
3. By excluding any remedy altogether.

We shall now endeavour to show what are the effects of an imperfect obligation in these three classes of cases.

¹ [Williston, Contracts, § 16, and Restatement of Contracts, § 14, are to the same effect as Pollock.]

² Savigny, Obl. 1. 22 *sqq.* For a summary statement of the effects of a natural obligation in Roman law, see Muirhead's note on Gai. 3. 119a.

³ The term "covenant en ley de nature" was applied by Bishop Stillington, C., to a parol agreement not to sue: 9 Ed. IV. 41, pl. 26.

1. REMEDY LOST: STATUTES OF LIMITATION

Under the first head we have to notice the operation of the Statutes of Limitation, so far as it illustrates the present subject. The Statute of Limitation of James I (21 Jac. c. 16, s. 3) enacted that the actions therein enumerated—which, with an exception afterwards repealed comprised all actions on simple contracts⁴—should “be commenced and sued” within six years after the cause of action, and not after. [The Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 2, replaces this by providing that “actions founded on simple contracts” “shall not be brought after the expiration of six years from the date on which the cause of action accrued.”] The Act came into effect on July 1st, 1940 (s. 34), and does not affect any action or arbitration commenced before the commencement of the Act or the title to any property which is the subject of any such action or arbitration.] The Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3, following the presumption of satisfaction after the lapse of twenty years which already obtained in practice,⁵ enacted that (*inter alia*) all actions of covenant or debt upon any bond or other specialty should be commenced and sued within twenty years of the cause of action. [This section was repealed by the Limitation Act, 1939, s. 2, sub-s. (3) of which provides that “an action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.”] The exceptions for disability do not concern us here, our object being not to define to what cases the statutes under consideration apply or have applied, but to observe the general results which follow when they are applicable.

Now there is nothing in these statutes to extinguish an obligation once created. The party who neglects to enforce his right by action cannot insist upon so enforcing it after a certain time. But the right itself is not gone. It is not correct even to say without qualification that there is no right to sue, for the protection given by the statutes is of no avail to a defendant unless he expressly claims it. Serjeant Williams, after noticing the earlier conflicts of opinion on this point, and some unsatisfactory reasons given at different times for the rule which has prevailed, concluded the true reason to be that “the Statute of Limitations admits the cause or consideration of the action still existing, and merely discharges the defendant from the remedy.”⁶ This alone shows

⁴ Debts contracted by an infant are often compared to debts barred by the statutes of limitation; and the comparison is just to this extent, that at common law they might be rendered enforceable in much the same manner, and practically the authorities are interchangeable on this point. But an infant's contract is in its inception not of imperfect obligation, but simply voidable.

⁵ As to the extent to which the statute applies to proceedings in equity, see *Knox v. Gye* (1871-2) L. R. 5 H. L. 656; 42 L. J. Ch. 234.

⁶ [The Act is fully noted in *Preston and Newsom, Limitation of Actions* (2nd. ed., 1943). *Roddam v. Morley* (1856-7) 1 De G. & J. 17; 26 L. J. Ch. 438; 118 R. R. 1.

⁷ 2 Wms. Saund, 163; cp. *Scarpellini v. Atcheson* (1845) 7 Q. B. at 878; 14 L. J. Q. B. at 338, on the technical effect of a plea of the statute. The rule continues under the Judicature Acts, Order XIX, r. 15 (No. 211).

that an imperfect obligation subsists between the parties after the time of limitation has run out. In the case of unliquidated demands that obligation is practically inoperative, since an unliquidated demand cannot be rendered certain except by action or an express agreement founded on the relinquishment of an existing remedy. But in the case of a liquidated debt the continued existence of the debt after the loss of the remedy by action may have other important effects. Although the creditor cannot enforce payment by direct process of law, he is not the less entitled to use any other means of obtaining it which he might lawfully have used before. Thus if he has a lien on goods of the debtor for a general account, he may hold the goods for a debt barred by the statute.⁹ And any lien or express security he may have for the particular debt remains valid.¹⁰ If the debtor pays money to him without directing appropriation of it to any particular debt, he may appropriate it to satisfy a debt of this kind:¹¹ much more is he entitled to keep the money if the debtor pays in on account of the particular debt, but not knowing whether by ignorance of fact or of law, that the creditor has lost his remedy. So an executor may retain out of a legacy a barred debt owing from the legatee to the testator.¹² He may also retain out of the estate such a debt due from the testator to himself: and he may pay the testator's barred debts to other persons,¹³ though not any particular debt which has been judicially declared to be not recoverable from the estate:¹⁴ and this even if the personal estate is insufficient.¹⁵ But though a creditor may retain a barred debt if he can, he may not resist another claim of the debtor against him by a set-off of the barred debt: for the right of set-off is statutory, and introduced merely to prevent cross actions, so that a claim pleaded by way of set-off is subject to be defeated in any way in which it could be defeated if made by action.¹⁶ This reason applies equally to all other cases of imperfect obligations. Herein our law differs from the Roman, in which *compensatio* did not depend on any positive enactment, but was an equitable right derived from the *ius gentium*.

Again, the creditor's lost remedy may be revived by the act of the debtor. The decisions on the statute of James I established

⁹ *Spears v. Hartly* (1800) 3 Esp. 81; 6 R. R. 814.

¹⁰ *Higgins v. Scot* (1831) 2 B. & Ad. 413; 36 R. R. 607; *Seager v. Aston* (1837) 26 L. J. Ch. 800 (on the statute of 3 & 4 Will. 4).

¹¹ *Mills v. Fowkes* (1839) 5 Bing. N. C. 455; 50 R. R. 750; *Nash v. Hodgson* (1855) 6 D. M. G. 474; 25 L. J. Ch. 186; 106 R. R. 157.

¹² *Courtenay v. Williams* (1844) 3 Ha. 539; 13 L. J. Ch. 461; 15 L. J. Ch. 204; 64 R. R. 403; cp. *Ross v. Gould* (1852) 15 Beav. 189; 92 R. R. 378.

¹³ *Hill v. Walker* (1858) 4 K. & J. 166; 116 R. R. 286; *Stahlschmidt v. Lett* (1853) 1 Sm. & G. 415; 96 R. R. 439.

¹⁴ *Midgley v. Midgley* [1893] 3 Ch. 282; 62 L. J. Ch. 905, C. A.

¹⁵ *Louis v. Runney* (1867) L. R. 4 Eq. 451 (not a considered decision). This is a peculiar rule. It is otherwise as to claims not enforceable by reason of the Statute of Frauds, 1677: *Re Rowson* (1885) 29 Ch. Div. 358; 54 L. J. Ch. 950.

¹⁶ The defence of set-off must be specially met by replying the statute of limitation: see 1 Wms. Saund. 431.

that a renewed promise to pay, or an acknowledgment from which a promise can be inferred, excludes the operation of the statute. [The following paragraphs were written by the author before the passing of the Limitation Act, 1939. The effect of that Act is considered on p. 507, *post*.] It was formerly held that the statute rested wholly on a presumption of payment, and therefore that any acknowledgment of the debt being unpaid, even though coupled with a refusal to pay, was sufficient. But this opinion has long since been overruled.¹⁷ Again, it has been said that although the original remedy is gone, the original consideration remains as a sufficient foundation for a subsequent promise. But this explanation is not satisfying, since the consideration for the new promise is wholly past, and therefore insufficient according to modern doctrine.¹⁸ The only theory tenable on principle seems to be that the statutes merely affect procedure, giving the debtor a defence which he may waive if he think fit. Nevertheless it is held that the acknowledgment operates as evidence of a new promise, and therefore it is not effectual unless made before action brought.¹⁹

The modern law was concisely stated by Mellish L.J. "There must be one of three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or secondly, there must be an unconditional promise to pay the debt. or thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."²⁰ The promise must be to pay the debt as *ex debito iustitiae*; a promise to pay as a debt of honour is insufficient, as it excludes the admission of legal liability.²¹ When the promise is implied, it must be as an inference of fact, not of law; the payment of interest under compulsion of law does not imply any promise to pay the principal.²² An acknowledgment may be implied from the payment of interest or of part of the principal on account of the whole, without any admission in writing.²³

¹⁷ 2 Wms. Saund. 183, 184.

¹⁸ See p. 139.

¹⁹ *Bateman v. Pinder* (1842) 3 Q. B. 574; 11 L. J. Q. B. 281; 61 R. R. 319.

²⁰ *Mitchell's claim* (1871) L. R. 6 Ch. at 828. And see *Wilby v. Elgee* (1875) L. R. 10 C. P. 497; 44 L. J. C. P. 254; *Chasemore v. Turner* (1874) (Ex. Ch.) L. R. 10 Q. B. 500, 506, 510, 520; 45 L. J. Q. B. 66, and the later case of *Meyerhoff v. Frohlich* (1878) 3 C. P. D. 333, in C. A., 4 C. P. Div. 63; 48 L. J. C. P. 43, which also show how much difficulty there may be in determining in a particular case whether there has been an unconditional promise: *Quincey v. Sharpe* (1876) 1 Ex. D. 72; 45 L. J. Ex. 347; *Skeet v. Lindsay* (1877) 2 Ex. D. 314; 46 L. J. Ex. 249; *Cooper v. Kendall* [1909] 1 K. B. 405; 78 L. J. K. B. 580, C. A. A promise to pay what may be found due on taking an account is enough: see *Langrish v. Watts* [1903] 1 K. B. 636; 72 L. J. K. B. 435, C. A. [In *Bouring-Hanbury's Trustees v. Bouring-Hanbury* [1943] Ch. 104, a mere statement of fact was held not to be an acknowledgment (the case did not involve the Limitation Act, 1939).]

²¹ *Maccord v. Osborne* (1876) 1 C. P. D. 568; 45 L. J. C. P. 727 (on Lord Tenterden's Act).

²² *Morgan v. Rowlands* (1872) L. R. 7 Q. B. 493, 498; 41 L. J. Q. B. 187.

²³ 2 Wms. Saund. 181, 187; see also the notes to *Whitcomb v. Whiting* (1781) 1 Sm. L. C.

[The Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), ss. 23—25, now contains the statutory law as to this. The parts of it especially relevant to this book are the following: S. 23, sub-s. (4), provides that “where any right of action has accrued to recover any debt or other liquidated pecuniary claim . . . and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment”: provided that a payment of the interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt. S. 24 requires every acknowledgment to be in writing signed by the person making it; acknowledgment or payment may also be made by his agent or to the agent of the person whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made. The Act does not define “acknowledgment,” but it has been urged that the word does not require proof of any express or implied *promise* to pay and that the law is therefore changed on this point.^{22a} Having regard to the conflict of authority in decisions preceding the Act on what did constitute a promise, it is to be hoped that this is a correct interpretation of the Act. The Act, so far as it relates to acknowledgment of the debt, repeals and replaces provisions of the Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), ss. 1, 3, 4, 8, and the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), ss. 9—14.]

We have seen that by the operation of the statutes of limitation applicable to simple contracts the right itself is not destroyed, but only the conditions of enforcing it are affected. This law of limitation is a law relating not to the substance of the cause of action, but to procedure. Hence it follows that these enactments belong to the *lex fori*, not to the *lex contractus*, and are binding on all persons who seek their remedy in the courts of this country.²⁴ A suitor in an English court must sue within the time limited by the

^{22a} [Preston & Newsom, *Limitation of Actions* (2nd ed. 1943), 210, replying on the interpretation put upon “acknowledgment” in the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 5, in *Moodie v. Bannister* (1859) 4 Drew. 432, 443. Sect. 5 (repealed by the Limitation Act, 1939) was limited to specialty debts. We may add, on our own account, that the Lord Chancellor’s Law Revision Committee, on whose report the Limitation Act, 1939, was based, recommended that “in respect of acknowledgment, simple contract debts should be put upon the same footing as specialty debts” (Fifth Interim Report (1936) Cmd. 5334, p. 26). No doubt such a recommendation cannot be taken into account by the Court in interpreting the Act of 1939, and, as to the argument in Preston & Newsom, one must bear in mind the necessity of caution in construing one statute by reference to another; but it would be lamentable if the Act of 1939 left the law relating to “acknowledgment” in the state of confusion described by Lord Sumner in *Spencer v. Hemmerde* [1922] 2 A. C. 507, 519—536.]

²⁴ This principle was approved and applied, after full discussion and very long deliberation by the Judicial Committee in *Ruckmaboye v. Lulooobhay* (1853) 8 Moo. P. C. 5; 97 R. R. 1. The only point that gave any real trouble was whether its application to Hindus at Bombay was compatible with the terms in which the personal law of Asiatic suitors was saved by the Charter of the Supreme Court then in force.

English statute, though the cause of action may have arisen in a country where a longer time is allowed.²⁶ Conversely, an action brought in an English court within the English period of limitation is maintainable although a shorter period limited by the law of the place where the contract was made has elapsed, even if a competent court of that place has given judgment in favour of the defendant on the ground of that period having expired.²⁶ And for this purpose a document under seal has been treated by an English court as creating a specialty debt, though made in a country where our distinction between simple contract and specialty debts does not exist, and more than six years before action brought.²⁷

The House of Lords, as a Scots court of appeal, has had to decide a similar question as between the law of Scotland and the law of France. It was held that the Scottish law of prescription applied to an action brought in Scotland on a bill of exchange drawn and accepted in France, the right of action on which in France had been saved by judicial proceedings there.²⁸ In the case where the shorter of the two periods of limitation is that allowed by the foreign law governing the substance of the contract, and that period had elapsed, it is of course necessary to ascertain that the foreign law is analogous to our own in its operation, and merely takes away the remedy without making the contract void at the end of the time of prescription. But it is considered that an actual destruction of the right would be so inconvenient and unreasonable that it may almost be presumed that such is not the operation of the law of any civilised state; and the English courts would not put such a construction on the foreign law unless compelled so to do by very strong evidence.²⁹

We shall presently see that analogous questions concerning the *lex fori* may arise in other cases of imperfect obligations.

2. CONDITIONS PRECEDENT TO REMEDY

Under the second head fall the cases of particular classes of contracts where the law requires particular acts to be done by the parties or one of them (in respect of the form of the contract

²⁶ *British Linen Co. v. Drummond* (1830) 10 B. & C. 903; 34 R. R. 595.

²⁷ *Huber v. Steiner* (1835) 2 Bing. N. C. 202; 42 R. R. 598 (debt barred by French law); *Harris v. Quine* (1869) L. R. 4 Q. B. 653; 38 L. J. Q. B. 331 (debt barred by Manx law): in the latter case Cockburn C.J. expressed some doubt as to the principle, admitting however that the rule was settled by authority: Savigny too (Syst. 8. 273), is for applying that law which governs the substance of the contract. Cp. Dicey, *Conflict of Laws*, 5th ed. 856.

²⁸ *Alliance Bank of Simla v. Carey* (1880) 5 C. P. D. 429; 49 L. J. C. P. 781 (a bond executed in British India). Possibly the use by British subjects of an English form, unmeaning at the place of execution, may justify the inference that they at that time intended the document to operate as an English deed. Otherwise the decision seems not easy to support.

²⁹ *Don v. Lippman* (1837) 5 Cl. & F. 1; 47 R. R. 1. See also 2 Wms. Saund. 399.

³⁰ *Huber v. Steiner* (1835) 2 Bing. N. C. 202; 42 R. R. 598, where it was in vain attempted to show that by the French law of prescription the right was absolutely extinguished.

or otherwise) as conditions precedent to the contract being recognized as enforceable.

A. STATUTE OF FRAUDS

The most important of the enactments thus imposing special conditions on contract is the fourth section of the Statute of Frauds, 1677 (29 Car. 2, c. 3).

The fourth section enacts that after the date there mentioned "no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person: or to charge any person upon any agreement made upon consideration of marriage; or upon any contract [or sale of lands, tenements, or hereditaments, or any interest in or concerning them³⁰]; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

The terms of the 17th section (now superseded in England by s. 4 of the Sale of Goods Act, 1893; 56 & 57 Vict. c. 71) were different, and raised a question whether they did not wholly avoid agreements not satisfying its conditions; yet the better opinion was that the 17th section like the 4th, was only a law of procedure;³¹ and the Sale of Goods Act has so settled it for the future by using the words "shall not be enforceable by action." And it seems that the statute does not prevent property from passing on an informal sale.³² The cases of part acceptance of the goods or part payment of the price are expressly provided for, either of these having the same effect as a duly made memorandum in writing.

We now return to the fourth section. For the sake of brevity we shall use the term "informal agreement" to signify any agreement which comes within this section and does not comply with its requirements.

For some time it was not fully settled what was the effect of this enactment on informal agreements. There was some authority for saying it made them void.³³ It was never held necessary in the courts of law for a defendant sued on an informal agreement to plead the statute specially, as in the case of the

³⁰ [The words in brackets are now replaced by the following under the Law of Property Act, 1925, s. 40, sub-s. (1): "for the sale or other disposition of land or any interest in land."]

³¹ Lord Blackburn in *Maddison v. Alderson* (1883) 8 App. Ca. at 488; Brett L.J. in *Britain v. Rosster* (1879) 11 Q. B. D. at 127; 48 L. J. Ex. 362. To the same effect the majority of the Lords in *Morris v. Baron* [1918] A. C. 1; 87 L. J. K. B. 145; *contra* Lord Finlay [1918] A. C. at 11.

³² *Taylor v. G. E. Ry. Co.* [1901] 1 K. B. 774; 70 L. J. K. B. 499.

³³ [See Williams, Statute of Frauds, Section IV, ch. IV.]

statutes of limitation: and it was held (before the Common Law Procedure Act, 1852; 15 & 16 Vict. c. 76) that a special plea was not only unnecessary but bad as an "argumentative denial" of the contract declared upon.³⁴ Moreover an action cannot be maintained when, although it is not brought to enforce any right *ex contractu*, the right which is the foundation of the plaintiff's claim depends on an informal agreement. In *Carrington v. Roots*³⁵ the plaintiff sued in trespass for seizing his horse and cart: the defendant pleaded that they were incumbering and doing damage on his ground: the plaintiff replied a verbal agreement that the defendant should sell the crop of grass growing there to the plaintiff, and that the plaintiff might enter with his horse and cart to take them. It was held that this agreement was for the sale of an interest in land within s. 4, and that the plaintiff could not set it up, though it might have been available as a *licence* only in answer to an action for trespass.³⁶ Both here and in the later case of *Reade v. Lamb* above cited the judges said distinctly enough that informal agreements were not only enforceable but void. And so Sir W. Grant appears to have thought in *Randall v. Morgan*.³⁷ These *dicta* are not consistent with the decisions to be presently mentioned in which the existence of an imperfect obligation is implied. And there had also been judicial expressions of opinion the other way. But it is not necessary to notice these, for the point was expressly decided by the Court of Common Pleas in *Leroux v. Brown*,³⁸ where the earlier *dicta* are also considered. The action was on a contract not to be performed within one year, and made in France, where by the French law the plaintiff might have sued on it. For the plaintiff it was argued that s. 4 of the Statute of Frauds applied to the substance of the contract, and therefore, on general principles of private international law, did not affect contracts which were made out of England, and which as to their substance were to be governed by the law of the place where they were made. But for the defendant it was answered that this enactment, like the Statute of Limitation, only affected the remedy, and was therefore a law of the procedure of the English courts, and as such binding on

³⁴ *Reade v. Lamb* (1851) 6 Ex. 130; 20 L. J. Ex. 161. Since the Judicature Acts the defence of the statute must always be distinctly raised on the pleadings. Order XIX. r. 15; cp. r. 20. The defendant need not specify on which section he relies, but if he does, he cannot alter it by amendment: *James v. Smith* [1891] 1 Ch. 384; 63 L. T. 524, *affd.* (on other grounds) 65 L. T. 544. As to the former practice in equity, see *Johnsson v. Bonhote* (1876) 2 Ch. Div. 298; 45 L. J. Ch. 651. Once properly raised the defence is available without further repetition at any subsequent stage of the proceedings: *ib.* Conversely, a party who omits to raise it may be estopped from doing so in later proceedings upon the same matter: *Humphries v. Humphries* [1910] 2 K. B. 531, C. A.

³⁵ (1837) 2 M. & W. 248; 46 R. R. 583.

³⁶ *Cp. Crosby v. Wadsworth* (1805) 6 East, 602; 8 R. R. 566.

³⁷ (1805) 12 Ves. at 73; 8 R. R. at 293.

³⁸ (1852) 12 C. B. 801; 22 L. J. C. P. 1; 92 R. R. 889; and see per Lord Blackburn in *Maddison v. Alderson*, note ³¹, p. 509.

all suitors who might seek to enforce their rights in those courts: the agreement might be good enough for any other purpose, but the plaintiff could not sue on it in England. And this view was adopted by the Court. Jervis C.J. said: "The statute in this part of it does not say that unless those requisites are complied with *the contract shall be void*, but merely that *no action shall be brought* upon it . . . The fourth section relates only to the procedure and not to the right and validity of the contract itself."³⁹ It will be observed that the plaintiff was here in the curious position of contending, in order to support his right to recover on a contract made in France, that it would have been absolutely void if made in England.⁴⁰ If this decision and the reasons given for it are correct, it would seem to follow that a foreign or colonial court ought to enforce an English agreement, notwithstanding that it was informal under s. 4 of the Statute of Frauds, if it had the general requisites of a valid contract in English law, and was not informal according to the local law of procedure.

It has even been argued that the words "no action shall be brought" confine the operation of the statute to civil process, so that an informal agreement for service not to be performed within a year might be enforced by criminal process under the Master and Servant Act, 1867 (30 & 31 Vict. c. 141). But the Court held that such a construction would be too unreasonable, and the statute must mean that informal agreements are not to be enforced in any way.⁴¹

It being established that the informal agreements we are considering are not void, it follows that they give rise to imperfect obligations. We will now indicate the results. We have seen that neither the obligation itself, nor any right immediately founded on it, can be directly enforced. But it is recognized for the purpose of explaining anything actually done in pursuance of it, and anything so done may in many cases be a good consideration for a new obligation on a subsequent and distinct contract, or a sufficient foundation for a new obligation *quasi ex contractu*.⁴²

A. RESULTS: MONEY PAID

Money paid under an informal agreement cannot be recovered back merely on the ground of agreement not being enforceable.

³⁹ [See also Dr. J. Williams in 50 L. Q. R. (1934) 532—537.]

⁴⁰ *Leroux v. Brown* was doubted by Willes J. in *Williams app. Wheeler resp.* (1860) 8 C. B. N. S. 299, 316; 125 R. R. 673. Savigny, Syst. 8, 270, also takes the opposite view. The case also took (*obiter*) a distinction between s. 4 and s. 17, which was not generally accepted.

⁴¹ *Banks v. Crossland* (1874) L. R. 10 Q. B. 97; 44 L. M. J. C. 8. The Act was repealed by the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90). *Qu.* whether the decision be applicable to the malicious breaches of contract in particular cases which are made substantive offences by the Conspiracy and Protection of Property Act, 1875 (38 & 39th Vict. c. 86).

⁴² [See Dr. J. Williams in 50 L. Q. R. (1934) 532—539.]

Thus if a responsibility has been assumed and executed under a verbal guaranty, the guarantor cannot recover back the money paid by him.⁴³ So a purchaser cannot recover a deposit paid on an informal agreement for the sale of land, the vendor remaining ready and willing to complete.⁴⁴ And not only can the one party keep money actually paid to him by the other, but if money is paid by A. to B. in order to be paid over to C. in pursuance of an informal agreement between A. and C. which C. has executed, then C. can recover it as money received to his use. In *Griffith v. Young*⁴⁵ the plaintiff was the defendant's landlord. The defendant wished to assign to one P. which he could not do without the plaintiff's consent. It was verbally agreed that P. should pay the defendant 100*l.* for goodwill, out of which the defendant was to pay 40*l.* to the plaintiff for his consent to the assignment. P. knowing of this agreement paid the 100*l.* to the defendant: it was held that the defendant was liable to the plaintiff for 40*l.* in an action for money received to his use. Lord Ellenborough said: "If one agree to receive money for the use of another upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money, if indeed it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of that other."

On the same principle, if on the faith of an informal agreement money has been paid in advance to a party who afterwards refuses or fails to perform his part of it, or has been expended on his account, it is conceived that proof of the agreement may be admitted to show what was in fact the consideration which has failed.⁴⁶

But an executor may not pay or retain a debt which by reason of the Statute of Frauds the creditor cannot enforce.⁴⁷

B. EXECUTION OF INFORMAL AGREEMENT

The execution of an informal agreement may be shown as a fact, and the party who has had some benefit from such execution, so as in fact to get what he bargained for, cannot treat the bargain as a nullity. Thus the delivery of possession under an informal agreement for the sale of land is a good consideration for a promissory note for the balance of the purchase-money.⁴⁸ It was held in the case cited that the bargain was for a future conveyance, and that the defendant, who did not deny the plaintiffs'

⁴³ *Shaw v. Woodcock* (1827) 7 B. & C. 73, 83, 84; 31 R. R. 158. Cp. *Sweet v. Lee* (1841) 3 M. & Gr. 452; 60 R. R. 546.

⁴⁴ *Thomas v. Brown* (1876) 1 Q. B. D. 714; 45 L. J. Q. B. 811.

⁴⁵ (1810) 12 East, 513; 11 R. R. 478.

⁴⁶ See *Pulbrook v. Lawes* (1876) 1 Q. B. D. 284; 45 L. J. Q. B. 178.

⁴⁷ *Re Rounson* (1885) 29 Ch. Div. 358; 54 L. J. Ch. 950.

⁴⁸ *Jones v. Jones* (1840) 6 M. & W. 84; 55 R. R. 521.

allegation that they were willing to convey, had got all he bargained for.

The same holds of an account stated. In *Cocking v. Ward*⁴⁹ there was an oral agreement by an incoming tenant from year to year to pay 100*l.* to the outgoing tenant: it was held that the agreement was within s. 4 of the statute, and the outgoing tenant could not recover the 100*l.* on the agreement itself, but that on an account stated he could.

Again, money due simply under an informal agreement from the plaintiff to the defendant cannot of course be set off; but the performance of an informal agreement by the defendant may be good as an accord and satisfaction. In *Lavery v. Turley*⁵⁰ the plaintiff sued for goods sold, &c.: the defendant pleaded an equitable plea showing that in pursuance of an agreement between the parties (which turned out to be verbal) the defendant had given up to the plaintiff possession of a house and premises in satisfaction of the causes of action sued upon. The plea was held good, and it seems it was good enough at law (per Bramwell and Channell BB.). Pollock C.B. said: "It is pleaded as a fact that the defendant performed the agreement and the plaintiff accepted such performance in satisfaction. The objection that the agreement was not in writing is got rid of. The fourth section of the Statute of Frauds does not exclude unwritten proof in the case of executed contracts."⁵¹ This of course does not mean that the agreement itself can in any case be sued upon.⁵¹

It is admitted that if A. agrees informally with X. to sell land to him, and afterwards agrees in writing to sell the same land to Z., and then conveys to X. in pursuance of the first agreement, Z. has no equity as against X.⁵²

C. PART PERFORMANCE

It is a well-known doctrine of equity that one who has partly performed an informal agreement for the purchase or hiring of land⁵³ is entitled to and can sue for a specific performance at the hands of the other party, if the acts of part performance have been done on the faith of an existing agreement, and have been of such

⁴⁹ (1845) 1 C. B. 858; 15 L. J. C. P. 245; 68 R. R. 831.

⁵⁰ (1860) 6 H. & N. 239; 30 L. J. Ex. 48; 123 R. R. 485.

⁵¹ Cp. *Souch v. Straubridge* (1846) 2 C. B. 808, 814; 15 L. J. C. P. 170; 69 R. R. 615 and remarks on the dictum there in *Sanderson v. Graves* (1875) L. R. 10 Ex. 234, 238, 241; 44 L. J. Ex. 210.

⁵² *Dawson v. Elli* (1820) 1 J. & W. 524; 21 R. R. 227.

⁵³ The doctrine is not extended to other transactions: *Britain v. Rossier* (1879) 11 Q. B. Div. 123, 131; 48 L. J. Ex. 362. See, however, per Kay J. *MacManus v. Cooke* (1887) 35 Ch. D. 681, 697; 56 L. J. Ch. 662. [Kay J. said "Probably it would be more accurate to say it applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing." In spite of Pollock's opinion in this note and of the much more emphatic obiter dictum of Atkin L. J. in *Re a Bankruptcy Notice* [1924] 2 Ch. 76—77; 93 L. J. Ch. 497 (where, however, the learned L. J. did not refer to *MacManus v. Cooke*) it is submitted that the dictum of Kay J. represents a sounder principle; the point is developed in Salmond & Winfield, *Law of Contracts*, 139—140.]

a kind that the parties cannot be restored to their original position" and if the existence of an agreement is reasonably to be inferred from the acts themselves, or they are "unequivocally referable to the contract";⁵⁴ he is equally liable to be sued." This seems to be the real meaning of the distinctions as to what is or is not a sufficient part performance. Payment of money is in itself an equivocal act, and therefore the part payment of purchase-money is not a sufficient part performance.⁵⁷ But payment of increased rent by a yearly tenant holding over has been held a sufficient part performance of an agreement for a lease.⁵⁸ Here the part performance consists not in the payment itself, but in a possession which, though continuous in time with the old possession of the plaintiff as yearly tenant, is shown to be in fact referable to some new agreement.⁵⁹ This doctrine of part performance is not in direct contradiction of the Statute of Frauds. It would be erroneous to say that a court of equity accepts proof of an oral agreement and part performance as a substitute for the evidence required by the statute. The plaintiff's right in the first instance rests not on contract but on a principle akin to estoppel; the defendant's conduct being equivalent to a continuing statement to some such effect as this: It is true that our agreement is not binding in law, but you are safe as far as I am concerned in acting as if it were. A man cannot be allowed to set up the legal invalidity of an agreement on the faith of which he has induced or allowed the other party to alter his position.⁶⁰ In the law of Scotland such facts are said to "raise a personal exception."⁶¹ The same principle of equity is carried out in certain cases of representation independent of contract (see p. 516) and even of mere acquiescence. In equity an owner may be estopped by acquiescence from asserting his rights, although there has not been any agreement at all.⁶² This also explains why the plaintiff must show part performance on his own side, and part performance by the defendant

⁵⁴ Such as an intending lessor making material alterations at the lessee's request : *Rawlinson v. Ames* [1925] 1 Ch. 96 ; 94 L. J. Ch. 113.

⁵⁵ *Maddison v. Alderson* (1883) 8 App. Ca. at 476 ; Bell's Principles, 479, cited by Lord Selborne, *ib.* at 477.

⁵⁶ *Biss v. Hygate* [1918] 2 K. B. 314 ; 87 L. J. K. B. 1101.

⁵⁷ Lord Selborne, 8 App. Ca. at 479. Nor payment of rent in advance without possession : *Chaproniere v. Lambert* [1917] 2 Ch. 356 ; 86 L. J. Ch. 726, C. A.

⁵⁸ *Nunn v. Fabian* (1865) L. R. 1 Ch. 35 ; 35 L. J. Ch. 140. See explanation of that case by Baggallay L. J. in *Humphreys v. Green* (1882) 10 Q. B. Div. at 156 ; 52 L. J. Q. B. 140 ; *diss.* Brett L. J. 10 Q. B. Div. 160 ; per Byrne J. *Miller & Aldworth v. Sharp* [1889] 1 Ch. 622, 624 ; per Swinfen Eady L. J. [1917] 2 Ch. 359, 360.

⁵⁹ This holds even where the possession was taken before the agreement was concluded : *Hodson v. Heuland* [1896] 2 Ch. 428 ; 65 L. J. Ch. 754. [See, too, *Broughton v. Snook* [1938] Ch. 505 ; 107 L. J. Ch. 204.]

⁶⁰ The reasons given in the older authorities are not as concordant or clear as might be desired, but Lord Selborne's opinion in *Maddison v. Alderson* (1880) 8 App. Ca. 467, 475, is now accepted as a classical and sufficient exposition : see Romer J.'s review of the doctrine in *Rawlinson v. Ames* [1925] Ch. 96, 109 ; 94 L. J. Ch. 113.

⁶¹ Bell, cited by Lord Selborne, 8 App. Ca. 476.

⁶² See *Ramsden v. Dyson* (1865) L. R. 1 H. L. 129, 140, 168 ; *Powell v. Thomas* (1848) 6 Ha. 300 ; 77 R. R. 116 ; and the remarks of Fry J. in *Willmott v. Barber* (1881) 15 Ch. D. 96, 105.

would be immaterial.⁴³ When the Court is satisfied that the plaintiff has altered his position on the faith of an agreement, and that the defendant cannot be heard to deny the existence of that agreement, it proceeds to ascertain by the ordinary means what the terms of the agreement were. The proof of this is strictly collateral to the main issue, though the practical result is that the agreement is enforced.

D. ANTE-NUPTIAL AGREEMENTS

The case of an agreement in consideration of marriage presents special difficulties, and has to be treated in an exceptional manner.⁴⁴ It is thoroughly settled that the marriage itself does not constitute such a part performance as to make the agreement binding in equity in the manner just mentioned, though other acts may have that effect.⁴⁵

Then, what is the effect of a post-nuptial "note or memorandum" satisfying the requisites of the statute on an ante-nuptial informal agreement? This is a rather complicated matter. It is not the Statute of Frauds alone that has to be considered in these cases, but also the Fraudulent Conveyances Act, 1571 (13 Eliz. c. 5),⁴⁶ and the extensive application of it by judicial construction to voluntary dispositions of property. Two distinct questions are in fact raised: namely whether an informal ante-nuptial agreement can after the marriage be rendered valid *as against the promisor*, and whether a post-nuptial settlement can be made to relate back to such an agreement so as to be deemed a settlement made for valuable consideration and thus be rendered valid *as against creditors*. The first question is answered in the affirmative by the decision in *Barkworth v. Young*⁴⁷ The case was decided on demurrer, and the facts assumed by the Court on the case made by the plaintiff's bill were to this effect. The testator against whose estate the suit was brought had orally promised his daughter's husband before and in consideration of the marriage that at his death she should have an equal share of his property with his other children. After the marriage the testator made an affidavit in the course of a litigation unconnected with this agreement, in which he incidentally admitted it. It was held that the affidavit was a sufficient note or memorandum of the agreement within the Statute of Frauds, and that as such, although subsequent to the marriage, it rendered the agreement binding on the testator.

The second question is answered in the negative by the almost

⁴³ *Caton v. Caton* (1865) L. R. 1 Ch. at 148; 35 L. J. Ch. 292.

⁴⁴ See Dav. Conv. vol. 3, part 1, appendix No. 1, for details.

⁴⁵ See *Lassence v. Tierney* (1849) 1 Mac. & G. 551, 571; 84 R. R. 158; *Surcome v. Piniger* (1853) 3 D. M. G. 571, 575; 22 L. J. Ch. 419; 98 R. R. 229, 232.

⁴⁶ [Repealed and replaced by Law of Property Act, 1925, s. 172.]

⁴⁷ (1856) 4 Drew. 1; 26 L. J. Ch. 153; 113 R. R. 297.

contemporaneous decision in *Warden v. Jones*.⁶⁸ That was a creditor's suit to set aside a post-nuptial settlement. It was attempted to support the settlement as having been made pursuant to an oral ante-nuptial agreement. This agreement was not referred to in the settlement by any recital⁶⁹ or otherwise. Both Romilly M.R. and Lord Cranworth C. on appeal held that the settlement could not be supported: and Lord Cranworth inclined to think⁷⁰ that if the settlement had expressly referred to the agreement it would have made no difference.

On the whole even if the imperfect obligation arising from an informal ante-nuptial agreement can be made perfect and binding as between the parties by a post-nuptial note or memorandum, it appears that the marriage consideration cannot in this way be imported into a post-nuptial settlement made in pursuance of the agreement so as to protect it from being treated as a voluntary settlement and subject to the consequent danger of being set aside at the suit of the settlor's creditors. There seems to be no ground in either case for drawing any distinction between promises made by one of the persons to be married and promises made by a third person to either of them. These doctrines appear to be both reasonable in themselves and not inconsistent with one another, as the Court of Appeal has now declared them not to be.⁷¹ There is nothing unexampled in a transaction being valid as regards the parties to it and invalid as regards the rights of other persons.

E. It is doubtful how far an informal agreement varying a perfect one can be relied on as a defence to an action brought on the original agreement. On principle it would seem that an agreement which will not support an action ought not to support a defence,⁷² and there is good authority to that effect,⁷³ but none of recent date.

There is yet another class of cases, not resting on contract or agreement at all, in which courts of equity have compelled persons to make good the representations concerning existing facts⁷⁴ on the faith of which they have induced others to act. The distinction is pointed out by Romilly M.R. in *Warden v. Jones*:⁷⁵ and the extension of the doctrine to married women shows very forcibly that it has nothing to do with contract or capacity for contracting;

⁶⁸ (1857) 23 Beav. 487; 2 De G. & J. 76; 27 L. J. Ch. 190; 119 R. R. 29. This is not inconsistent with *Barkworth v. Young*: see *Re Holland* [1902] 2 Ch. 360; 71 L. J. Ch. 518, especially per Stirling L.J. The husband's trustee in bankruptcy has no better right than the husband himself: *ib.*

⁶⁹ As to the effect of reciting a previous agreement, see *Re Holland*, last note.

⁷⁰ Notwithstanding *Dundas v. Dutens* (1790) 1 Ves. jun. 196; 1 R. R. 112.

⁷¹ *Cp. Chapin v. Freeland* (1886) 142 Mass. 383.

⁷² *Noble v. Ward* (1867) L. R. 2 Ex. 135, Ex. Ch. But as to the different case of unconditional rescission, see *Morris v. Baron* [1918] A. C. 1; 87 L. J. K. B. 145.

⁷⁴ Per Lord Selborne, *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873) L. R. 6 H. L. 352, 360; 43 L. J. Ch. 269; and *Maddison v. Alderson* (1883) 8 App. Ca. at 473.

⁷⁵ (1857) 23 Beav. at 493; *cp. Yeomans v. Williams* (1865) L. R. 1 Eq. 184, 186; 35 L. J. Ch. 283; and see *Dav. Conv.* 3, 640—646.

for a married woman's interest in property, though not settled to her separate use, has repeatedly been held to be bound by this kind of equitable estoppel.⁷⁶ This, of course, under the old law of married women's incapacity.

B. "SLIP" IN MARINE INSURANCE⁷⁷

Another curious and important instance of an imperfect obligation arising out of special conditions imposed on the formation of a complete contract is to be found in the case of marine insurance. In practice the agreement is concluded between the parties by a memorandum called a slip, containing the terms of the proposed insurance and initialled by the underwriters.⁷⁸ It is the practice of some insurers always to date the policy as of the date of the slip.⁷⁹ At common law the slip would constitute a binding contract. This however is not allowed by the revenue laws. By the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 93,⁸⁰ "A contract for sea insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Act Amendment Act, 1862; 25 & 26 Vict. c. 63⁸¹) [*i.e.*, against the owner's liability for accidents of the kinds mentioned in s. 54 of that Act] shall be void unless the same is expressed in a policy of sea insurance."

Earlier statutes on the matter now before us were differently worded, and made every contract of insurance "null and void to all intents and purposes" which was not written on duly stamped paper or did not contain the prescribed particulars. (35 Geo. 3, c. 63, ss. 11, 14; 54 Geo. 3, c. 144, s. 3: the latter statute was expressly pointed, as appears by the preamble, against the practice of "using unstamped slips of paper for contracts or memorandums of insurance, previously to the insurance being made by regular stamped policies.") It was settled on these statutes that the preliminary slip could not be regarded as having any effect beyond that of a mere proposal:⁸² and it was even held that the slip could not be looked at by a court of justice for any purpose whatever.⁸³

⁷⁶ *Sharpe v. Foy* (1868) L. R. 4 Ch. 35; *Lush's trusts* (1869) *ib.* 591.

⁷⁷ [See Arnould, *Marine Insurance* (12th ed. 1939), §§ 34 *seq.*]

⁷⁸ For the form of this, see L. R. 8 Q. B. 471; L. R. 9 Q. B. 420. In the case of fire insurance, there being no statutory requirement, there is nothing to prevent a slip from forming a complete contract of insurance; the burden of proof is on the underwriter to show a contrary intention; and there is not any implied condition that a policy shall be put forward for signature within a reasonable time: *Thompson v. Adams* (1889) 23 Q. B. D. 361.

⁷⁹ See L. R. 8 Ex. 199. The Marine Insurance Act, 1906 (6 Ed. 7, c. 41), s. 21 provides that, for the purpose of showing when the contract was concluded, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.]

⁸⁰ As to stamping and production in evidence (which does not affect our present subject), see s.s. 95—97: there is a special penalty of 100*l.* instead of the usual 10*l.* for stamping in Court. This Act is not affected by the Marine Insurance Act, 1906.

⁸¹ Now Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 506.

⁸² See per Willes J. in *Xenos v. Wickham* (1866) L. R. 2 H. L. 296, 314; 36 L. J. C. P. 313; *Smith's case* (1869) L. R. 4 Ch. 611; 38 L. J. Ch. 681.

⁸³ See *Marsden v. Reid* (1803) 3 East, 572; 7 R. R. 516.

The change in the language of the modern statute law, which dates from 1867,⁸⁴ has given the Courts the opportunity of adopting a more liberal construction without actually overruling any former authorities.

It has now for many years been judicially recognized that the slip is in practice and according to the understanding of those engaged in marine insurance the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can without the assent of the other deviate from the terms thus agreed on without a breach of faith. Accordingly, though the contract expressed in the slip is not valid, that is, not enforceable, it may be given in evidence wherever it is, though not valid, material.⁸⁵ In the case referred to the slip was admitted to show whether the intention of the parties was to insure goods by a particular named ship only, or by that in which they might be actually shipped, whatever her name might be. A still more important application of the same principle was made in *Cory v. Patton*,⁸⁶ where it was held that the time when the contract is concluded and the risk accepted is the date of the slip, at which time the underwriter becomes bound in honour, though not in law, to execute a formal policy; that the Court, when a duly stamped policy is once before it, may look to the slip to ascertain the real date of the contract; and therefore that if a material fact comes to the knowledge of the assured after the date of the slip and before the execution of the policy, it is not his duty either in honour or in law to disclose it, and the non-disclosure of it does not vitiate the policy. This holds though after the completion of the contract by the slip a new term be added for the benefit of the underwriters.⁸⁷ The same doctrine has been considered and allowed, though not directly applied, in other cases. In *Fisher v. Liverpool Marine Insurance Co.*⁸⁸ the slip had been initialled but the insurance company had executed no policy. In the case of an insurance with private underwriters it is the duty of the broker of the assured to prepare a properly stamped policy and present it for execution. But in the case of a company the policy is prepared by the company, executed in the company's office, and handed over to the assured or his agent on application. It was held that there was no undertaking by the company, distinguishable from the contract of insurance itself, to do that which it would be the duty of a broker to do in the case of private underwriters;

⁸⁴ 30 & 31 Vict. c. 23, repealed, except two sections not here relevant [which had been repealed by an earlier Act], and on this point substantially re-enacted, by the Stamp Act, 1891 (54 & 55 Vict. c. 39).

⁸⁵ Per Cur. *Ionides v. Pacific Insurance Co.* (1871) L. R. 6 Q. B. 674, 685; affd. in Ex. Ch. 7 Q. B. 517; 41 L. J. Q. B. 33, 190.

⁸⁶ (1872) L. R. 7 Q. B. 304; see further, s. c. 9 Q. B. 577; 43 L. J. Q. B. 181.

⁸⁷ *Lisham v. Northern Maritime Insurance Co.* (1875) L. R. 8 C. P. 216; affirmed in Ex. Ch. 10 C. P. 179; 44 L. J. C. P. 185.

⁸⁸ (1874) L. R. 8 Q. B. 469 (Blackburn J. diss.); affd. in Ex. Ch. 9 Q. B. 418; 43 L. J. Q. B. 114.

that the only agreement of the company with the assured was one entire agreement made by the initialling of the slip, and that as this was an agreement for sea insurance, the statute applied and made it impossible to maintain any action for a breach of duty with regard to the preparation and execution of a policy. In *Morrison v. Universal Marine Insurance Co.*,⁸⁹ the question arose of the effect of delivering without protest a stamped policy pursuant to the slip after the insurers had discovered that at the date of the slip a material fact had been concealed. It was held in the Exchequer Chamber, reversing the judgment of the Court below, that the delivery of the policy did not preclude the insurers from relying on the concealment, but that it was a question properly left to the jury whether they had or had not elected to abide by the contract. This implies not only that the rights of the parties are determined at the date of the slip, but that the execution of the stamped policy afterwards has little or no other significance than that of a necessary formality.⁹⁰ In the case of a mutual marine insurance association, a letter by which the assured undertook to become members of the association was admitted as part of one agreement with the stamped policy, to show that the assured were contributories in the winding-up of the association.⁹¹ In the winding-up of another such association a member has been admitted as a creditor for the amount due on his policy, though unstamped, when the liability was admitted by entries in the minute books of the association, which seem to have been considered equivalent to an account stated.⁹²

UNSTAMPED DOCUMENTS GENERALLY

It has already been observed that the general revenue laws as to stamp duties are on a different footing. However their effects may in one or two cases resemble to some extent those which under the present head we have attempted to exhibit. Thus, if an unstamped document combines two characters (as, for instance, if it purports to show both an account stated and a receipt), and if in one of those characters it requires a stamp, and in the other not, it may be given in evidence in the second character for any purpose unconnected with the first.⁹³ [But this is no longer law since the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 14, sub-s. (4). In *Fengl v. Fengl*,⁹⁴ it was held, on the interpretation of this sub-section, that an unstamped document, which requires a stamp, cannot be received in evidence, except in criminal proceedings, for any purpose whatever, including a collateral purpose.]

⁸⁹ (1873) L. R. 8 Ex. 40, in Ex. Ch. *ib.* 197; 42 L. J. Ex. 115.

⁹⁰ See the judgment of Cleasby B. in the Court below, L. R. 8 Ex. at 60.

⁹¹ *Blyth & Co.'s case* (1872) L. R. 13 Ex. 529.

⁹² *Martin's claim* (1872) L. R. 14 Eq. 148; 41 L. J. Ch. 679.

⁹³ *Matheson v. Ross* (1849) 2 H. L. C. 286; 81 R. R. 153.

⁹⁴ [1914] P. 274; 84 L. J. P. 29. Pollock seems to have overlooked this decision.]

In a case where the parties to an agreement in writing had afterwards varied its terms by a memorandum in writing, and the memorandum was not stamped, the plaintiff joined in his action a count on the agreement in its original form and another on the agreement as varied: and when it appeared by his own evidence that the memorandum did materially alter the first agreement, but was unavailable for want of a stamp, it was held that he could not fall back on the agreement as it originally stood.⁹⁵ Neither this decision, nor the earlier authorities on which it rested, were referred to in *Noble v. Ward*.⁹⁶ In that case there was a substituted agreement which was unenforceable under s. 17 of the Statute of Frauds, 1677:⁹⁷ and it was held that as the parties had no intention of simply rescinding the former agreement, that former agreement remained in force. The two cases, if they can stand together, must do so by reason of the distinction between a contract the record of which is unavailable for want of a stamp, and an agreement which cannot be sued on at all if the defendant pleads the statute.

C. PROFESSIONS REGULATED BY STATUTE

There are many statutes which impose special conditions on the exercise of particular professions and occupations and the sale of particular kinds of goods. Most of these, however, are so framed, or have been so construed, as to have an absolutely prohibitory effect, that is, not merely to take away or suspend the remedy by action, but to render any transaction in which their provisions are disregarded illegal and void. The principles applicable to such cases have been considered under the head of Unlawful Agreements. In a few cases, however, there is not anything to prevent a right from being acquired, or to extinguish it when acquired, but only a condition on which the remedy depends. Of this kind are the provisions of the Solicitors Act (22 & 23 Geo. 5, c. 37), 1932, with respect to solicitors, and of the Medical Act, 1858 (21 & 22 Vict. c. 90) with respect to medical practitioners.

Under the Solicitors Act, 1932, s. 50, superseding and substantially re-enacting earlier provisions, a solicitor practising in any court without having a practising certificate then in force, is not capable (nor is any other person) of recovering costs for any business done by him while uncertificated. This, however, does not make it unlawful for the client to pay such fees if he thinks fit, nor for the solicitor to take and keep them. A defeated party in an action who has to pay his adversary's costs is bound by any such payment which has been actually made, and cannot claim

⁹⁵ *Reed v. Deere* (1827) 7 B. & C. 261; 31 R. R. 190.

⁹⁶ (1867) L. R. 1 Ex. 117; in Ex. Ch. 2 Ex. 135; but otherwise where the substituted agreement has been executed in part; for this shows that the old one is gone: *Sanderson v. Graves* (1875) L. R. 10 Ex. 234; 44 L. J. Ex. 210.

⁹⁷ Now repealed and substantially re-enacted by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4.

to have it disallowed after taxation.¹ But, since the Attorneys and Solicitors Act, 1874 (37 & 38 Vict. c. 68; replaced by the Act of 1932) at all events, a successful party whose solicitor was uncertificated cannot recover costs if the objection is made on taxation.² Nor can a solicitor retain out of funds advanced by his client (not knowing him to be uncertificated), costs which as being incurred under those conditions, would not be allowed on taxation.³ Some further details given in earlier editions are now omitted partly as being obsolete and partly as not illustrating any matter of principle.⁴

MEDICAL PRACTITIONERS

The rights of medical practitioners now depend on the Medical Acts, 1858 (21 & 22 Vict. c. 90) and 1886 (49 & 50 Vict. c. 48), and (in England only) the Apothecaries Act (55 Geo. 3, c. 194).⁵ Before the Medical Act the state of the law so far as concerned physicians (but not surgeons or apothecaries) was this: It was presumed, in accordance with the general usage and understanding, that the services of a physician were honorary, and were not intended to create any legal obligation: hence no contract to pay for them could be implied from his rendering them at the request either of the patient or of a third person. But this was a presumption only, and there was nothing contrary to law in an express contract to pay a physician for his services, which contract would effectually exclude the presumption.⁶

The Medical Act, 1886 (49 & 50 Vict. c. 48), s. 6, enables every registered medical practitioner to recover his expenses, charges, and fees, unless restrained by a prohibitory by-law of a college of physicians of which he is a fellow.⁷ Accordingly there is no longer any presumption of honorary employment.⁸ It remains competent however for a medical man to attend a patient on the understanding that this attendance shall be gratuitous, and whether such an understanding exists or not in a disputed case is a question of fact for a jury.⁹

¹ *Fullalove v. Parker* (1862) 12 C. B. N. S. 246; 31 L. J. C. P. 239, 240.

² *Fowler v. Monmouthshire Canal Co.* (1879) 4 Q. B. D. 334; 48 L. J. Q. B. 457.

³ *Broune v. Barber* [1913] 2 K. B. 553; 82 L. J. K. B. 1006, C. A.

⁴ As to special agreements between solicitor and client, they are now contracts under special regulation as to mode of enforcement and otherwise. See the Solicitors Act, 1932, Part V.

⁵ This is still in force subject to certain amendments made by the Apothecaries Act Amendment Act 1874 (37 & 38 Vict. c. 34): see *Davies v. Makana* (1885) 29 Ch. Div. 596; 54 L. J. Ch. 1148.

⁶ *Veitch v. Russell* (1842) 3 Q. B. 928; 12 L. J. Q. B. 13. No such presumption exists in the United States; and *qu.* how far, if at all, it exists in British dominions beyond seas.

⁷ Such by-laws have been made by the Royal College of Physicians in London, and (though apparently without compulsory force under the Act) the Royal College of Surgeons of England.

⁸ *Gibbon v. Budd* (1863) 2 H. & C. 92; 32 L. J. Ex. 182; 133 R. R. 586 (on the similar provision of the Act of 1858, which is repealed by the Act of 1886). See judgment of Martin B.

Gibbon v. Budd, last note.

By the Apothecaries Act 55 Geo. 3, c. 194, s. 21, an apothecary cannot recover his charges without having a certificate from the Apothecaries' Society: and this is not repealed by the Medical Acts.⁹

It seems that a practitioner must have been registered at the time of rendering the services sued for, not merely at the time of suing,¹⁰ decisively and at all events as to apothecaries: for an unrepealed section of the Apothecaries Act (55 Geo. 3, c. 194), s. 20, expressly forbids unqualified persons to practise; and in the clear opinion of the Court on the construction and intention of the Medical Act also.

A qualified practitioner cannot recover for services rendered by an unqualified assistant who in fact acted without his specific direction or advice.¹¹

Similarly an agreement by a qualified practitioner to assist an unqualified one is bad, though perhaps an unqualified person might lawfully carry on medical business through qualified assistants if he did not act as a practitioner himself.¹²

3. CASES WHERE NO REMEDY ALLOWED

We now come to the cases in which some positive rule of law or statutory enactment takes away the remedy altogether.

The only cases known to the writer in which there is a rule of law to this effect independent of any statute are those of the remuneration of barristers engaged as advocates in litigation and (to a limited extent) of arbitrators.

With regard to arbitrators the better opinion appears to be that they are in the same condition as physicians were at common law. It is said that an arbitrator cannot recover on any implied contract for his remuneration, but this is by no means certain [and such modern authority as there is favours the view that there can be recovery on an implied contract.¹³] There is no doubt that he can sue on an express contract.¹⁴

⁹ See decisions on this Act collected 1 Wms. Saund. 513-4. S. 31 of the Medical Act, 1858 (21 & 22 Vict. c. 90), enabled a practitioner to sue only "according to his qualification," and a qualification in one capacity did not entitle him to sue for services rendered in another: *Leman v. Fletcher* (1873) L. R. 8 Q. B. 319; 42 L. J. Q. B. 214. But these words do not occur in the Act of 1886, which on the other hand requires all practitioners to be generally qualified.

¹⁰ *Leman v. Houseley* (1874) L. R. 10 Q. B. 66; 44 L. J. Q. B. 22 (notwithstanding *Turner v. Reynall* (1863) 14 C. B. N. S. 328; 32 L. J. C. P. 164; 135 R. R. 719).

¹¹ *Alvarez de la Rosa v. Prieto* (1864) 16 C. B. N. S. 578; 33 L. J. C. P. 262; *Howarth v. Brearley* (1887) 19 Q. B. D. 303; 56 L. J. Q. B. 543.

¹² *Davies v. Makuna* (1885) 29 Ch. Div. 596; 54 L. J. Ch. 1148. The decisions on the construction of the various penal sections of medical and other like Acts directed against unqualified practitioners who hold themselves out as qualified are not within the scope of the present work.

¹³ [See Russell on Arbitration (13th ed. 1935), 437, and the cases there cited, especially *Brown v. Llandoverly Terra Cotta, Ltd.* (1909) 25 T. L. R. 625.]

¹⁴ *Hoggins v. Gordon* (1842) 3 Q. B. 466; 11 L. J. Q. B. 286; 61 R. R. 257; *Veitch v. Russell* (1842) 3 Q. B. 928; 12 L. J. Q. B. 13. In *Crompton v. Ridley* (1887) 20 Q. B. D. 48, 52, A. L. Smith J. thought that in mercantile arbitrations a promise to pay for the arbitrator's services might well be implied. When a case is referred by the Court.

COUNSEL'S FEES

The position of a barrister is different.

It was formerly a current opinion that in the case of counsel, as in that of a physician, there was a presumption of purely honorary employment, derived from the custom of the profession, but that this presumption would be excluded by proof of an express contract.¹⁵ But the decision of the Court of Common Pleas in *Kennedy v. Broun*¹⁶ established the unqualified doctrine that "the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation." The request and promises of the client, even if there be express promises, and the services of the counsel, "create neither an obligation nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any promise."

On the other hand, there is apparently no reason to doubt the validity of an express contract to remunerate a barrister for services which, though to some extent of a professional kind, and involving the exercise of professional knowledge, do not involve any relation of counsel and client between the contracting parties: as when a barrister acts as arbitrator or returning officer.¹⁷ The want of attending to this distinction has led to such cases being cited as authorities for the general proposition that a barrister can recover fees on an express contract.

Moreover, it has been argued that an express contract even between counsel and client may still be good as to non-litigious business. A claim of this sort made against an estate under administration was disposed of by Giffard L.J. on the ground which was sufficient for the particular decision, that at all events a solicitor has not general authority to bind his client by such a contract: but he also observed that such applications had never been successful, and expressed a hope that they never would be.¹⁸ And it must be remembered that although the rule laid down in *Kennedy v. Broun* is in its terms confined to litigation, and the

the referee's or arbitrator's remuneration is determinable by the Court: Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 90, replacing the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15.

¹⁵ So Lord Denman seems to have been inclined to think in *Veitch v. Russell* (1832) 3 Q. B. 928; 12 L. J. Q. B. 13; and the Irish case of *Hobart v. Butler* (1859) 9 Ir. C. L. 157, though it did not decide the point, proceeded to some extent on the same assumption.

¹⁶ (1863) 13 C. B. N. S. 677; 32 L. J. C. P. 137; 134 R. R. 696.

¹⁷ *Hoggins v. Gordon* (1842) 3 Q. B. 466; 11 L. J. Q. B. 286; 61 R. R. 257; *Egan v. Guardians of Kensington Union* (1841) 3 Q. B. 935, n.

¹⁸ *Mostyn v. Mostyn* (1870) L. R. 5 Ch. 457, 459; 39 L. J. Ch. 780. The cases there referred to in argument in favour of the counsel's claim seem, with the sole exception of *Hobart v. Butler* (1859) 9 Ir. C. L. 157, irrelevant. For instance, *Doe d. Bennett v. Hale* (1850) 15 Q. B. 171; 18 L. J. Q. B. 353; 81 R. R. 540, shows only that there is no absolute rule of law that in a civil cause a barrister may not be instructed directly by the client, and throws no light whatever on any question of a right to recover fees. *Hobart v. Butler* was itself really a decision against a similar claim and on an almost identical point.

word *advocate*, not *counsel*, is studiously used throughout the judgment, yet the rule is founded not on any technical distinction between one sort of business and another, nor on any mere presumption, but on a principle of general convenience supported by unbroken custom. No doubt it may be said that some of the reasons given for the policy of the law do not apply in their full extent to non-litigious business; and it is doubtful whether they apply even in overseas jurisdictions where the common law is in force.¹⁹ But there is no reason to suppose that English courts of justice are likely to narrow the scope of a decision called by Lord Justice Giffard "a landmark of the law on this subject."²⁰

There is no express authority to show whether a barrister can or cannot contract with his client's solicitor for payment of his fees any more effectually than with the client himself; but it seems not; for even when counsel's fees have been received by the solicitor from the lay client they are not debts attachable under a garnishee order against the solicitors at the suit of a judgment creditor of the counsel.²¹

It is hardly necessary to add that although counsel's fees cannot be recovered in any way by action, the propriety of paying such fees is judicially recognized by the constant practice of the court in the taxation of costs: and the solicitor needs no authority from the client beyond his general retainer to enable him to retain and pay counsel and charge the fees to his client.²² The payment of counsel's fees may in this manner be indirectly enforced either against the client himself or against an unsuccessful adversary who is liable for the taxed costs. Notwithstanding the strong expressions used by the Court in *Kennedy v. Broun*,²³ the judicial notice thus taken of the obligation of a client to pay his counsel seems to show that it is something different from a mere moral obligation.

INFANTS' CONTRACTS

Since the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), any contract of an infant voidable at common law and affirmed by him on attaining his majority must be reckoned as an imperfect obliga-

¹⁹ *Reg. v. Doutre* (1884) 9 App. Ca. at 751, where it was held that the case at bar was governed by the law of the Province of Quebec: in that law there is nothing to prevent an advocate from suing for professional services.

²⁰ *Mostyn v. Mostyn*, note ¹⁸, above.

²¹ *Wells v. Wells* [1914] P. 157; 83 L. J. P. 81, C. A. (alimony pendente lite in divorce proceedings), overruling *Re Hall* (1856) 2 Jur. N. S. 1076; 149 R. R. 803, so far as it involved anything to the contrary. Other cases in bankruptcy have proceeded on the duty of the trustee or assignees as officers of the Court and not on any legal right of the barrister: *ib.* It has been attempted, without success, to prove in the administration of a solicitor's insolvent estate, for counsel's fees paid to the solicitor on his false statement to the client that counsel had received them: *Re Sandiford* (No. 2) [1935] 1 Ch. 681. Yet counsel's voucher for fees requires a receipt stamp: *General Council of the Bar v. Inland Revenue Commissioners* [1907] 1 K. B. 462; 76 L. J. K. B. 212.

²² See *Morris v. Hunt* (1819) 1 Chitty, 544.

²³ (1863) 13 C. B. N. S. 677; 32 L. J. C. P. 137; 134 R. R. 696.

tion of this class, *viz.* on which there has not been and cannot be any remedy. The special features of this subject have been already considered,²⁴ and there is nothing to add except that the general principles set forth in the present chapter seem to be applicable to these, so far as they still exist, as well as to other agreements of imperfect obligation.

MISCELLANEOUS

There are sundry other cases of a less important kind in which the remedy naturally attached to a contract is taken away by statute, without the contract itself being forbidden or avoided.

By the Sale of Spirits Act, 1751 (24 Geo. 2, c. 40, s. 12), commonly known as the Tippling Act, no debt can be recovered for spirituous liquors supplied in quantities of less than twenty shillings' worth at one time.²⁵ The County Courts Act, 1934 (24 & 25 Geo. 5, c. 53), s. 188,²⁶ similarly enacts that no action shall be brought in *any* court for the price of beer or other specified liquors *ejusdem generis* consumed on the premises. The Act of Geo. 2 applies whether the person to whom the liquor is supplied be the consumer or not.²⁷ As these enactments do not make the sale illegal, money which has been paid for spirits supplied in small quantities cannot be recovered back.²⁸ A debt for such supplies was once held to be an illegal consideration for a bill of exchange:²⁹ but this decision seems dictated by an excess of zeal to carry out the policy of the Act, and is possibly questionable. In a later case at Nisi Prius³⁰ Lord Tenterden held that where an account consisted partly of items for spirituous liquors within the Tippling Act, and partly of other items, and payments had been made generally in reduction of the account, the vendor was at liberty to appropriate these payments to the items for liquor, so as to leave a good cause of action for the balance: thus treating these debts, like debts barred by the Statute of Limitation of James I, as existing though not recoverable.

The writer is not aware of any decision on the modern enactment as to beer, &c., in the County Courts Act.

By the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4, certain agreements therein enumerated and relating to the management and operations of trade unions cannot be sued upon but it is expressly provided that they are not on that account to be deemed

²⁴ In Chap. 2.

²⁵ By 25 & 26 Vict. c. 38, an exception is made in favour of sales of spirituous liquor not to be consumed on the premises, and delivered at the purchaser's residence in quantities of not less than a reputed quart.

²⁶ Superseding a similar enactment in the County Courts Acts, 1867 (30 & 31 Vict. c. 142), and 1888 (51 & 52 Vict. c. 43).

²⁷ *Hughes v. Done or Doane* (1841) 1 Q. B. 294; 10 L. J. Q. B. 65; 55 R. R. 253.

²⁸ *Philpott v. Jones* (1834) 2 A. & E. 41; 41 R. R. 371.

²⁹ *Scott v. Gillmore* (1810) 3 Taunt. 226; 12 R. R. 641.

³⁰ *Crookshank v. Rose* (1831) 5 C. & P. 19; 38 R. R. 788.

unlawful. One curious result of this legislation is that various agreements which at common law would be void as being in restraint of trade are now merely not enforceable, and are capable of having a legal standing, for example as the foundation of an account stated.³¹

The present place seems on the whole the most appropriate one for mentioning a singular case which may be regarded as the converse of those we have been dealing with. A valuable consideration is given in the course of a transaction which as the law stands at the time is wholly illegal and confers no right of action on either party. Afterwards the law which made the transaction illegal is repealed. Is the consideration so received a good foundation for a new express promise on the part of the receiver? The question came before the Court of Exchequer in 1863, some years after the repeal of the usuary laws. The plaintiff sued on bills of exchange drawn and accepted after that repeal, but in renewal of other bills given before the repeal in respect of advances made on terms which under the old law were usurious. The former bills were unquestionably void: but it was held by the majority of the Court that the original advance was a good consideration for the new bills. The question was thus stated in the judgment of the majority:—"Whether an advance of money under such circumstances as to create no legal obligation at the time to repay it can constitute a good consideration for an express promise to do so." And the answer was given thus:—"The consideration which would have been sufficient to support the promise if the law had not forbidden the promise to be made originally does not cease to be sufficient when the legal restriction is abrogated . . . A man by express promise may render himself liable to pay back money which he has received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt."³² The debt, therefore, which was originally void by the usury laws, seems to have been put in the same position by their repeal as if it had been a debt once enforceable but barred by the Statute of Limitation. But the decision seems wrong, for the consideration was wholly past at the time of the promise. The consideration for accepting a renewed bill of exchange is not the value received which was the consideration of the original bill, but the abandonment of the right of action thereon.

There is one other analogy to which it is worth while to advert, although it was never of much practical importance, and what little it had has in England been taken away by the Judicature Acts. Purely equitable liabilities have to a certain extent been

³¹ *Evans v. Heathcote* [1918] 1 K. B. 418; 87 L. J. K. B. 599, C. A.

³² *Flight v. Reed* (1863) 1 H. & C. 709, 715, 716; 32 L. J. Ex. 265, 269; 130 R. R. 741. Langdell (Summary, § 76) supports the case on the ground that the bills sued on were an actual payment of the usurious loan. *Quod nimium subtiliter dictum videtur.*

treated by common law courts as imperfect obligations. The mere existence of a liquidated claim on a trust against the trustee confers no legal remedy. But the trustee may make himself legally liable in respect of such a claim by an account stated,³³ or by a simple admission that he holds as trustee a certain sum due to the cestui que trust.³⁴ A court of law has also held that a payment made by a debtor without appropriation may be appropriated by the creditor to an equitable debt.³⁵

SUMMARY OF RESULTS

It may be useful to sum up in a more general form the results which have been obtained in this chapter.

An imperfect obligation is an existing obligation which is not directly enforceable.

This state of things results from exceptional rules of positive law, and especially from laws limiting the right to enforce contracts by special conditions precedent or subsequent.

When an agreement of imperfect obligation is executory a right of possession immediately founded on the obligation can be no more enforced than the obligation itself.

Acts done in fulfilment of an imperfect obligation are valid, and may be the foundation of new rights and liabilities, by way of consideration for a new contract or otherwise.

A party who has a liquidated and unconditional claim under an imperfect obligation may obtain satisfaction thereof by any means other than direct process of law which he might have lawfully employed to obtain it if the obligation had not been imperfect.

The laws which give rise to imperfect obligations by imposing special conditions on the enforcement of rights are generally treated as part of the law of procedure of the forum where they prevail, and as part of the *lex fori* they are applicable to a contract sued upon in that forum without regard to the law governing the substance of the contract;³⁶ but on the other hand they are not regarded in any other forum.

³³ *Topham v. Morecraft* (1858) 8 E. & B. 972, 983; *Howard v. Brownhill* (1853) 23 L. J. Q. B. 23.

³⁴ *Roper v. Holland* (1835) 3 A. & E. 99.

³⁵ *Bosanquet v. Wray* (1816) 6 Taunt. 597; 16 R. R. 677.

³⁶ This (it is conceived) does not apply to revenue laws, and enactments which are merely ancillary to revenue laws, such as the provisions relating to marine insurances (p. 517).

14¹

REMEDIES FOR BREACH OF CONTRACT

[Where a contract has been broken and the injured party resorts to a law court for redress, the usual remedy that he claims is damages. Other remedies are specific performance and injunction; either of these may be not merely alternative to damages but even cumulative to them.¹ These three remedies must be separately considered.

DAMAGES²

These consist of an award of pecuniary compensation to the injured party. It has been said that he is, so far as money can do it, to be placed in the same situation as if the contract had been performed.³ But this broad statement is subject to so many qualifications that it is likely to be misleading. In the first place, the loss of time and the exasperation attendant upon legal proceedings of any sort are never taken into account, nor, in general, is the mental agitation caused by mere disappointment of one's expectation that a contract will be fulfilled. Secondly, there may be items of loss which the plaintiff can exactly specify but for which he can recover nothing. A debtor who does not pay punctually a debt of 100*l* may cause his creditor a loss far in excess of the amount of the debt simply because the creditor is in urgent need of the 100*l* and is forced to borrow it at ruinous interest elsewhere; but it does not follow that he will recover the amount of that interest as damages. Again, though a successful litigant is generally awarded costs, these are usually taxed costs and they never represent all that he has expended on the litigation. Yet again, where the contract gives the defendant the option of performing two things, one of higher pecuniary value than the other, and his breach of the contract consists in failure to perform either, the damages will not exceed the lower of these values.⁴ Finally, it will be seen from the rules stated below that there are further restrictions on the amount of damages recoverable.

It must be observed that, even if no actual damage be proved

¹ I have written this chapter. See Preface. P. H. W.

² For a historical account, see George T. Washington, "Damages in Contract at Common Law"; 47 L. Q. R. 345-379; 48 L. Q. R. 90-108. The leading English monographs are Mayne on Damages (10th ed. by F. Gahan); Arnold, Damages and Compensation (2nd ed.); Gahan, Law of Damages (1936). For American law, see Index, "Damages," in Williston on Contracts and in the Restatement of the Law of Contracts.

³ Parke, B. in *Robinson v. Harman* (1848) 1 Ex. at p. 855; often repeated in later

⁴ Scrutton, L.J., in *Withers v. General Theatre Corporation* [1933] 2 K. B. 536, 548-550; 102 L. J. K. B. 719, and authorities cited there by him.

by the plaintiff who has established that the defendant has committed a breach of contract, he is nevertheless entitled to at least nominal damages.⁵ Formerly, these were "a mere peg on which to hang costs,"⁶ but since the Judicature Act, 1873, the discretion of the judge in awarding costs extends to cases where nominal damages are recovered. We may note, too, the distinction between general damage, which is such damage as the law presumes to follow from an infringement of a legal right or a legal duty; and special damage, which is damage the details of which are specified by the plaintiff in his pleadings. Whether he is claiming general damage or special damage, he must prove the damage, but the difference is that in the former case, although he is able to establish an unquestionable loss, he cannot specify any particular items in it; whereas in the latter case he can put his finger on particular facts from which particular pecuniary loss has arisen.⁷ An example of general damage is furnished by *Aerial Advertising Co. v. Batchelors Peas, Ltd.*,⁸ where A proved that, in consequence of B's breach of contract, several retail dealers, who had previously given A orders, had ceased to do so, or had found a great decline in customers for the goods which A had supplied to the retailers. A was awarded damages for the loss thus sustained. No doubt in cases like this the ascertainment of the exact sum of money representing the damage is a difficult matter, but at any rate there is a foundation to work upon—the plaintiff's proof of loss, and that marks the difference between such cases and *Sunley & Co., Ltd., v. Cunard White Star, Ltd.*,⁹ where the Court of Appeal pointed out that if the plaintiff does not prove the loss he has sustained, the judge is not entitled to "make a guess in the dark and award him some arbitrary sum."¹⁰

We now proceed to state the leading rules referred to above. The *locus classicus* for the first three of them is *Hadley v. Baxendale*,¹¹ but we shall have to refer to other cases that have carried out in fuller detail the general principles laid down in that decision.

RULE 1

Damages for breach of contract "should be such as may fairly and reasonably be considered . . . arising naturally, *i.e.*, according to the usual course of things from such breach of contract itself."¹² An illustration of this occurs in the liability of a seller who has failed to deliver goods in pursuance of a contract of sale. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51, sub-s. 3¹² (which here embodies the previous Common Law) provides that

⁵ *Marzetti v. Williams* (1830) 1 B. & Ad. 415, 423-424.

⁶ Maule, J. in *Beaumont v. Greathead* (1846) 2 C. B. 494, 499.

⁷ [1938] 2 All E. R. 788, 795-796.

⁸ [1940] 1 K. B. 740 (C. A.); 109 L. J. K. B. 833.

⁹ [1940] 1 K. B. at p. 747.

¹⁰ (1854) 9 Ex. 341.

¹¹ *Ibid.* 354.

¹² Sect. 50 lays down the same rules *mutatis mutandis* for the converse case of refusal by the buyer to accept the goods.

where there is an available market¹² for the goods, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver. If there is no available market, the measure of damages is the loss directly and naturally arising in the ordinary course of events (s. 51, sub-s. 2).^{13a} More complicated cases occur where the market for a particular class of articles is essentially a variable one. "Skates and furs are more salcable at the beginning of winter; muslins and silks at the beginning of summer."¹⁴ The law takes cognizance of the loss that may be caused owing to this element of fluctuation, when goods have not been delivered, or have been delivered so late as to miss the market. It allows damages to be recovered for the diminution in value of the goods owing to the season for their resale by the buyer having passed, but it will not include in these damages the loss of anticipated profits which the buyer expected to make by the resale. Thus in *Wilson v. Lancashire and Yorkshire Ry Co.*¹⁵ W bought from X cloth for manufacture into caps, which he was in the habit of selling throughout the country by means of commercial travellers. The defendant railway company negligently delayed delivery of the cloth so that when it arrived it was too late for W's purposes. He sued the company and it was held that he could recover the amount of the diminution in value of the cloth owing to the season for manufacturing and selling caps having passed; but not any damages for the loss of expected profits or for the expenses of travellers who had been despatched on fruitless journeys. There is this distinction between these two claims for damages. W was entitled to compensation for the decline in value of the cloth *as cloth* owing to its late delivery, but not to compensation for his failure to sell it at a profit *as caps*.¹⁶ The reason why such profits are not recoverable appears from Rule 2 below.

If the injured party incurs increased expense in doing himself what the other party had contracted to do, he can claim that as damages, provided the expense is no more than a reasonable and prudent person would have incurred.¹⁷ A railway company which fails to set me down at the destination named on my ticket must

¹² "Market price" apparently signifies price in the retail market; see James, L.J. in *Dunkirk Colliery Co. v. Lever* (1878) 9 Ch. D. 20, 25.

^{13a} If the buyer is unable to procure elsewhere the goods bargained for, the measure of damages is the profit that the buyer would have made if the contract had been performed; *Lea-Vey & Co., Ltd. v. George Hirst & Co., Ltd.*, [1944] K. B. 24. With respect to sale of land, see *Ridley v. De Geerts* [1945] 2. All E. R. 654.

¹⁴ Mayne, *Damages* (10th ed.), 12. ¹⁵ (1861) 9 C. B. N. S. 632.

¹⁶ See Byles, J. *ibid.* 646. *Wilson's Case* was applied in *Schulze v. G. E. Ry. Co.* (1887) 19 Q. B. D. 30, and in *Wertheim v. Chicoutimi Pulp Co.* [1911] A. C. 301, 308.

¹⁷ *British Westinghouse Co., Ltd. v. Underground Electric Ry. Co., Ltd.* [1912] A. C. 673, 689—690.

make good to me what I reasonably spend on another conveyance to get me there, or on hotel charges if staying at a hotel be the more reasonable course.¹⁸ But if I am going to Scarborough merely for purposes of pleasure, and miss my connexion at York through the unpunctuality of the company on whose railway I am travelling, it is not reasonable that I should take a special train to Scarborough and expect the company to bear the expense of it.¹⁹ Had my journey been for business purposes, the case might be otherwise,²⁰ though even then it is conceived that the urgency of the business would be the decisive factor. The plaintiff indeed must not only avoid the active incurrence of unreasonable expenses in doing what the defendant ought to have done, but he must also take all reasonable steps to mitigate the loss consequent upon the defendant's breach of contract.²¹ Thus, a servant who has been wrongfully dismissed ought to try to procure employment elsewhere, and, if he refuses to accept a reasonable offer of it, he may find himself entitled to merely nominal damages against his former employer.²² Whether an attempt to reduce the loss is reasonable is a question of fact²³ and if, though it is reasonable, it does not in fact have that effect, the plaintiff is not to suffer on that account, and, perhaps this is so even if his efforts actually increase the loss.²⁴

The damages sustained by a breach of contract are, of course, not confined to physical injuries. They may well include inconvenience, such as that of being compelled to walk five miles on a wet night in order to complete a journey which ought to have been wholly by rail if the defendants had fulfilled their obligations. Such was the decision in *Hobbs v. L. & S.W. Ry. Co.*,²⁵ where, in addition to the discomfort of the walk and as a result of it, the

¹⁸ *Hamlin v. G. N. Ry. Co.* (1856) 1 H. & N. 408.

¹⁹ *Le Blanche v. L. & N. W. Ry. Co.* (1876) 1 C. P. D. 286, 307, 323.

²⁰ Circumstances may, however, make damages of this sort too remote. Suppose that A, owing to negligent delay on the part of a railway company, misses a business appointment with B and thereby loses what would have been a highly profitable contract with B, it is submitted that this loss is damage which is too remote, unless the railway company knew of the essentiality of punctual conveyance of A and accepted him as a passenger on those terms (see Rules 2 and 3 stated hereafter in the text). The contrary conclusion might possibly be inferred from *Buckmaster v. G. E. Ry. Co.* (1870) 23 L. T. 471; but Chitty on Contract (19th ed.), 727, regards the defendants in this case as having had special notice that the loss that did occur would result. I cannot discover from the report of *Buckmaster's Case* that such notice was given, but Chitty's proposition that, if there is no such notice, the damage is usually too remote is, I think, sound, not only because it is supported by two other authorities he cites (*Cooke v. M. Ry. Co.* (1892) 57 J. P. 388, and an anonymous case cited by Tindal, C.J. in *Walton v. Fothergill* (1835) 7 C. & P. 392, 394), but also because, if the rule were otherwise, it would cast an intolerable burden on railway companies and other conveyers of travellers.

²¹ *British Westinghouse Co., Ltd. v. Underground Electric Ry. Co., Ltd.* [1912] A. C. 673, 689.

²² *Brace v. Calder* [1895] 2 Q. B. 253.

²³ *Gahan, Damages*, 139-143, and authorities there cited. Recent illustrations are *Jewellowski v. Propp* [1944] 1 K. B. 510, and *Houndsditch Warehouse Co., Ltd. v. Waltes, Ltd.* [1944] 1 K. B. 579.

²⁴ The point is well settled in the law of tort and Lord Atkinson in *Wilson v. United Counties Bank, Ltd.* [1920] A. C. 102, 125, regarded it as applicable in the law of contract.

²⁵ (1875) L. R. 10 Q. B. 111.

plaintiff's wife caught a cold which made her ill for some time. The court held, however, that she could recover nothing for this, because the damage was too remote. 'This part of the decision is, in the light of later cases, of very doubtful authority. It was unfavourably commented on in *McMahon v. Field*,²⁶ where Brett, L.J. remarked, "suppose a man let lodgings to a woman and then turned her out in the middle of the night with only her night-clothes on, would it not be a natural consequence that she would take a cold?" Moreover, though the general principle as to causation is much the same as it was in Bacon's time,²⁷ the modern tendency is to discern links in a chain of events that were imperceptible in a rougher age. Illness resulting from nervous shock has been regarded in quite modern times as not too remote a consequence in the law of tort. There is no direct decision on this point in the law of contract, but the Court of Appeal has held that nervous shock came within the terms of an insurance policy, "absolute for all accidents, however caused, occurring to the insured in the fair and ordinary discharge of his duty."²⁸

It is commonly stated that, in an action for breach of contract, no damages can be awarded for injury to the plaintiff's reputation; but, owing to the ambiguity of the word "reputation," both the textbooks and some of the decisions are likely to be misunderstood unless the law is explained in more detail. There is no doubt that if a breach of contract cause loss of one's purely personal reputation, no compensation can be awarded for it in an action for breach of contract, for the correct and adequate remedy for such loss is an action in tort for defamation.²⁹ On the other hand, if a breach of contract inflicts injury on the goodwill attached to the business of the plaintiff, he may recover damages for it. In *Foaminol Laboratories, Ltd. v. British Artid Plastics, Ltd.*,³⁰ it was held that if the plaintiffs could have established loss of goodwill (in fact the evidence was insufficient to establish such loss), they could have been compensated for it; Hallett, J. referred to this as "loss of reputation," but it is clear from what the learned Judge said elsewhere³¹ that by this he meant "loss of goodwill," and the goodwill of a man's business is a different thing from his personal reputation. Harm to his personal reputation may possibly also harm that goodwill, but damages awarded for the latter injury are compensation for harm to a business asset, not for harm to the reputation. Again, it has been laid down in a series of decisions that an actor can recover damages for "loss of publicity"

²⁶ (1881) 7 Q. B. D. 591, 596.

²⁷ "It were infinite for the law to judge the causes of causes, and their impulsions one of another, therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree." *Elements of the Common Lawes*. (1639), p. 1.

²⁸ *Pugh v. L. B. & S.C. Ry. Co.* [1896] 2 Q. B. 248.

²⁹ *Addis v. Gramophone Co., Ltd.* [1909] A. C. 488 (H. L.) 78 L. J. K. B. 1122.

³⁰ [1941] 2 All E. R. 393.

³¹ *Ibid.* 401.

if the defendant has prevented him from fulfilling his engagement to perform in the particular role or at the particular theatre stipulated for in the contract between the defendant and the actor. The leading case is *Clayton & Waller, Ltd. v. Oliver*,³² where Lord Buckmaster deprecated the description of "loss of publicity" as "loss of reputation."³³ In a later decision, the Court of Appeal held that, in a claim for loss of publicity, "damage to a reputation already existing by not allowing an appearance is not a matter which can be considered, but what has to be considered is whether, if the actor had been allowed to appear, that appearance would have given him publicity, and whether he has been deprived of that opportunity of appearing."³⁴ This clearly shews the distinction between loss of reputation and loss of publicity. The latter means loss of opportunity of increasing one's professional reputation, and deprivation of that opportunity is not necessarily a reflection on that reputation, for it does not follow that if the opportunity is afforded, the actor's use of it will enhance his reputation. His reputation may be improved but it is possible that his performance may be such as to lower it. It is not an inevitable consequence of entering a horse for a race that it will be the winner even if it is backed as the favourite. Another view of these "loss of publicity" cases is that they did relate to the plaintiff's reputation, and that the reason why he could recover damages for injury to it was that it was a term in the contract that the defendant should not inflict any such injury on the plaintiff.³⁵

In the law of contract, as in other branches of the law, the mere fact that assessment of damages is, in any particular case, a matter of difficulty, is no ground for a refusal by the Court to award any damages at all. It must, to some extent, be a matter of speculation as to what is the equivalent in money of loss of profit caused by a breach of contract which deprives the plaintiff of an opportunity of exhibiting samples of his goods at an agricultural show,³⁶ or of an opportunity of appearing at a personal interview at which the merits of the plaintiff in a "beauty competition" are to be weighed against the claims of other competitors,³⁷ but nevertheless damages were awarded in each of these cases.³⁸

There has been a good deal of controversy in legal literature as

³² [1930] A. C. 209 (H. L.); 99 L. J. K. B. 165, approving *Marbe v. George Edwardes (Daly's Theatre), Ltd.* [1928] 1 K. B. 269; 96 L. J. K. B. 980.

³³ [1930] A. C. at p. 220.

³⁴ *Withers v. General Theatre Corporation* [1933] 2 K. B. 536, 547 (per Scrutton, L.J.); 102 L. J. K. B. 719.

³⁵ Hallett, J. in the *Foaminol Case (supra)* [1941] 2 All E. R. at p. 399. With respect, it is questionable whether the earlier decisions support this view.

³⁶ *Simpson v. L. & N. W. Ry.* (1876) 1 Q. B. D. 274, 277.

³⁷ *Chaplin v. Hicks* [1911] 2 K. B. 786.

³⁸ The decision in *Sabwell v. Bass* [1910] 2 K. B. 486, had better be regarded as based simply on the ground that the damages were too remote. In so far as the remarks of Jelf, J. went beyond that, they cannot be supported; see Fletcher Moulton, L.J., in *Chaplin v. Hicks* [1911] 2 K. B. 786, 797.

to the extent (if any) to which the rule laid down in *Re Polemis*³⁹ applies to damage sustained by a breach of contract." The rule is that damage is not too remote if it is the direct consequence of wrongful conduct, whether or not that consequence could have been reasonably anticipated. In a later decision, *Liesbosch Dredger v. Edison S.S.*,⁴⁰ where the action was in tort, the House of Lords restricted "direct consequences" to "immediate physical consequences." Now, the decision in *Re Polemis* was upon a clause in a charter-party, which of course is a contract, and though it is commonly regarded by writers as primarily a decision on tort, the question arises whether it also applies to breach of contract. It is submitted that it may be fairly inferred from *Weld-Blundell v. Stephens*⁴¹ that it does extend to a breach of contract, but subject to the important qualification embodied in Rule 2 in *Hadley v. Baxendale* (*infra*). In *Weld-Blundell v. Stephens* the plaintiff employed the defendant, a chartered accountant, to investigate the affairs of a company. His instructions to the defendant contained libels on X and Y, two officials of the company. The defendant handed the letter to A, his partner, who negligently left it at the company's office, where it was found by the manager. He communicated its contents to X and Y. X and Y recovered damages for libel against the plaintiff. The plaintiff then sued the defendant to recover the amount which he had paid for damages and costs in the libel actions. His claim was based on the breach of a term, implied in the contract between himself and the defendant, that the defendant should keep the letter secret. A majority of the House of Lords held that the damages resulting from the libel actions were too remote, and that the defendant was liable for nominal damages only. Lord Sumner used language which anticipated the rule adopted in *Re Polemis*. On the facts before him, he was of opinion that the manager's unauthorised act in communicating the letter to X and Y snapped the chain of causation between the dereliction of duty by the defendant in the first instance and the damage ultimately suffered by the plaintiff. Moreover, considerable weight attaches to a broad statement of principle by Lord Sumner: "The damage must be such as would flow from the breach of duty in the ordinary and usual course of things. *That is the general rule, both in contract and in tort, except that in contract the law does not consider as too remote such damages as were in the contemplation of the parties at the time when the contract was made.* Subject to that, only such

³⁹ [1921] 3 K. B. 560 (C. A.).

⁴⁰ The point was first raised by me in Salmond & Winfield Law of Contracts, 506, and the conclusions there stated are in effect repeated here. It has been urged in some quarters that what I said there amounted to a statement that *Re Polemis* conflicts with *Hadley v. Baxendale*. This is inexplicable, for a bare reference to the passage in Salmond & Winfield cited above will shew that, in my opinion, there is no such conflict.

⁴¹ [1933] A. C. 449, 461.

⁴² [1920] A. C. 956.

damages can be recovered as were immediately and naturally caused by the breach."⁴² The exception adverted to is better stated as follows.

RULE 2

(Where there are special circumstances in a contract wholly unknown to the defendant, he is not liable for damages solely due to those special circumstances, though he is liable for general damages.

The reason for this is that if he had known of the special circumstances, he might never have made the contract without special provision as to the damages, and it would be very unjust to deprive him of that advantage. The rule, which has been repeatedly followed, was laid down in *Hadley v. Baxendale*.⁴³ The plaintiffs owned a flour mill, in which an iron shaft had broken. They sent the shaft to the office of the defendants, who were common carriers, and the defendant's clerk was told that the mill was stopped, and that the shaft must be delivered immediately to X. X was the person who was to make a new shaft on the pattern of the old one, and this was the reason why it was sent to him. The defendants delayed carriage of the broken shaft for an unreasonable time. The plaintiffs consequently received the new shaft several days late, and were thus unable to work their mill and incurred a loss of profits. The loss of these profits was held to be too remote. The defendants certainly knew that the mill had ceased working, but they knew nothing of the special circumstance that the profits of the mill must be stopped by their breach of contract. For all they knew to the contrary, the plaintiffs might have had a spare shaft, or the mill might have had some additional defect besides the broken shaft which would have rendered it still unworkable, even if the new one had been punctually supplied.)

In *Horne v. Midland Ry. Co.*,⁴⁴ in the course of the Franco-Prussian War, 1870-1871, the plaintiffs contracted to sell shoes for the use of the French Army at an unusually high price. They delivered them to the defendants for carriage. The plaintiffs told the defendants that they (the plaintiffs) were under a contract to deliver the shoes to the French customer by February 3, but they did not tell them that the contract with the customer was, owing to exceptional circumstances, an unusual one. The defendants delayed carriage of the shoes, the customer rejected them, and the plaintiffs were obliged to get rid of them at their ordinary market value. The defendants paid into Court 20l, which covered any ordinary loss occasioned by their delay. The question was

⁴² [1920] A. C., at p. 979, citing Bowen L.J., in *Cobb v. G. W. Ry. Co.* (1893), 62 L. J. Q. B., at p. 337. Cf. Professor Goodhart in *Cambridge Legal Essays*, 121.

⁴⁴ (1854), 9 Exch. 341, 354-355.

⁴⁵ (1873), L. R. 8 C. P. 191.

whether, in addition to this, they were liable for £671, which was the difference between the high price that the plaintiffs would have got but for the delay, and the market price which they actually did get. The Court refused to allow this head of damages, for the defendants had never been informed of the much larger price that might have been obtained, and to fix them with liability for this would have been all the harsher because, as common carriers, they were bound to accept the goods.¹⁶

RULE 3

Where there are special circumstances in a contract, communicated by the plaintiff to the defendant when the contract is made, the defendant is liable for such damages as the parties would reasonably contemplate, *i.e.*, for such as would ordinarily follow from a breach of contract made in the special circumstances so communicated.

This third rule, which is also deducible from *Hadley v. Baxendale*,⁴⁷ might appear to be merely the converse of Rule 2 (*supra*) and scarcely worth stating. But the necessity for propounding it is based on the consideration that there seems to be no direct decision that the defendant, in order to be liable for this kind of damages, must not only know of the special circumstances (that point is clear law), but must also have *accepted the contract with the special condition about damages*. It has been argued with much force that to make a man liable for consequences, which the law would not have implied, by merely acquainting him with the likelihood of those consequences before they actually occur, would be very unjust; and there are judicial *dicta* which reinforce this view.⁴⁸ But apparently no actual decision goes quite so far.⁴⁹ Cases which might have raised, or did raise, the point were disposed of either on the ground that there had been no notification whatever to the defendant of the special circumstances, or on the ground that he had by implication of law contemplated, at the time that he made the contract, the damage which ensued in the particular case,⁵⁰ and if he contemplated it, he presumably

¹⁶ See, too, *The Arpad* [1934] P. 189, and *Simon v. Pawson & Leafs, Ltd.* (1932) 148 L. T. 154. In certain circumstances, a sub-contract may be used as evidence to assist the Court in determining how much should be awarded to the plaintiff as general damages; *Grebert-Borgnis v. Nugent* (1885) 15 Q. B. D. 85; *Leavey & Co., Ltd. v. George Hirst & Co., Ltd.* [1944] 1 K. B. 24.

⁴⁷ (1854) 9 Ex. 341, 354-355.

⁴⁸ Willes, J., in *British Columbia Saw-Mill Co. v. Nettleship* (1868) L. R. 3 C. P. 499, at pp. 508-509; and in *Horne v. Midland Ry. Co.* (1872), L. R. 7 C. P., at p. 591; and the opinions of Kelly, C.B., Martin, B., and Blackburn, J., in the same case on appeal: L. R. 8 C. P. 131. Mr. Gahan in his edition of *Mayne on Damages* (10th ed.), 36, and in his own monograph on Damages, 29, regards the matter as settled law. There is no doubt that it ought to be law and the learned author's wide practical experience reinforces the view that it is law.

⁴⁹ Blackburn, J., in case last cited, and in *Elbinger Action-Gesellschaft, & Co. v. Armstrong* (1874) L. R. 9 Q. B. 473, 478-479.

⁵⁰ E.g., *Hammond v. Bussey* (1887), 20 Q. B. D. 79, where Lord Esher, M.R., discussed *Hadley v. Baxendale*.

accepted it as a term in the contract. This, of course, leaves it open whether the law would imply such contemplation in every case from mere notice of the special circumstances.

RULE 4

Damages for breach of contract are not, in general, punitive.

The familiar classification of damages as nominal, ordinary, or exemplary, does not apply entirely in the law of contract. Nominal and ordinary damages are common enough, but exemplary (or vindictive, or punitive) are not allowed. Thus, a servant who is wrongfully dismissed from his employment cannot include in his claim for damages compensation for the manner in which he was dismissed or for his injured feelings.⁵¹ The rule is now beyond doubt, but no very convincing reason has been given for it, or for distinguishing here between the law of tort and the law of contract. Historically, we do not get much that will help us one way or the other, for though tort and contract have a common link in *assumpsit*, yet so far as the measure of damages was concerned they parted company pretty early.⁵² But whether this divergence applied to exemplary damages is another matter, for until 1695 the Courts would not interfere at all on account of excess of damages,⁵³ and there is some show of authority in the nineteenth century that they could be awarded for breach of contract.⁵⁴ In still earlier times, the jury had a wider discretion than they have now.⁵⁵ However, the law is now settled the other way, and perhaps the best justification of it is that common experience shows that men are much less likely to outrage the feelings of one against whom they break a contract than those of one on whom they inflict a tort.

One exception there is, however, in which exemplary damages are recoverable. That is where there has been a breach of promise of marriage. The action upon it "has always been held to embrace the injury to the feelings, affections and wounded pride, as well as the loss of marriage." Probably this is due to the practical impossibility of fixing the amount of the compensation by any precise rule.⁵⁶

There seems to be no foundation for the view that the damages which are awarded against a banker for dishonouring his cus-

⁵¹ *Addis v. Gramophone Co., Ltd.*, [1909] A. C. 488.

⁵² *Essays in Anglo-American Legal History*, iii, 275—276 (Ames); i, 327 (Salmond).

⁵³ *Petersdorff*, Abr. Damages viii (A.).

⁵⁴ *Sondes (Lord) v. Fletcher* (1822), 5 B. & Ald. 835; *Smith v. Thompson* (1849), 8 C. B. 44. And see the dissenting speech of Lord Collins in *Addis v. Gramophone Co., Ltd.* [1909] A. C. 488, 497—501.

⁵⁵ *Bac. Abr. Damages* (D) 1, and cases there cited.

⁵⁶ *Willes, J.*, in *Smith v. Woodfine* (1857), 1 C. B. (N.S.) at p. 668; *Bowen, L.J.*, in *Finlay v. Chirney* (1888), 20 Q. B. D., at pp. 504—506. Possibly we have here a legacy of ecclesiastical law which would regard with indignation a breach of faith of this sort. The common law Courts began to take cognisance of such actions about the middle of the seventeenth century; *Baker v. Smith* (1651), *Style*, 295.

tomers cheque when he has funds to meet it may be exemplary.⁵⁷ They may be substantial, because the dishonouring is an act particularly calculated to be injurious to a person in trade.⁵⁸

RULE 5

The parties themselves may fix the amount of damages at the time they enter into the contract, subject to the distinction between "penalty" and "liquidated damages."

In general, the parties to a contract are themselves the best judges of what ought to be paid for a breach of it, and the Courts will not interfere with their mode of assessment. But there are limits to this. If A stipulates with B that 1,000*l* shall be paid by B if B does not pay A 10*l* by March 1, the damages are so ludicrously disproportionate to the injury actually suffered by A owing to B's unpunctuality that the sum of 1,000*l* is a mere "penalty," and only the actual damages which A has sustained are recoverable. But in circumstances where it is uncertain what the amount of injury is that has been inflicted by the breach, the sum fixed by the parties is recoverable as "liquidated damages." The rules for distinguishing a penalty from liquidated damages were carefully summarised by Lord Dunedin in *Dunlop Pneumatic Tyre Co., Ltd., v. New Garage and Motor Co., Ltd.*⁵⁹ and the substance of them is given here.

(i) Though the parties to a contract who use the words "penalty" or "liquidated damages" may be presumed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages.⁶⁰

(ii) The essence of a penalty is a payment of money stipulated as in *terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.⁶¹

(iii) Whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and circumstances of each particular contract, judged at the time of making the contract and not at the time of breach.⁶²

(iv) To assist in this task of construction the following tests have been suggested:—

(1) The sum is a penalty if it is extravagant and unconscionable in comparison with the greatest loss that could conceivably be

⁵⁷ Lord Atkinson in *Addis v. Gramophone Co., Ltd.* [1909] A. C., at p. 495.

⁵⁸ *Rolin v. Steward* (1854), 14 C. B. 595; *Wilson v. United Counties Bank, Ltd.* [1920] A. C. 102. If the customer is not a trader, he can recover only nominal damages, unless he proves special damage; *Gibbons v. Westminster Bank, Ltd.* [1939] 2 K. B. 882.

⁵⁹ [1915] A. C. 79, at pp. 86—88. See too *English Hop Growers v. Dering* [1928] 2 K. B. 174, 181—2, 187—8, 192. *Cellulose &c. Co., Ltd. v. Widnes Foundry* (1925), *Ltd.* [1933] A. C. 20.

⁶⁰ *Clydebank Engineering Co. v. Don Jose, &c.* [1905] A. C. 6, 8—9.

⁶¹ [1915] A. C., at p. 86.

⁶² *Public Works Commissioner v. Hills* [1906], A. C. 368; *Webster v. Bosanquet* [1912], A. C. 394.

proved to have followed from the breach, *e.g.*, an agreement that you should build a house for 50*l* subject to a forfeiture of a million pounds if you exceeded that sum;⁶⁶ or a covenant to pay a larger named sum if a smaller named sum is not paid by a particular date—the usual stipulation in a common money bond.⁶⁷

(2) There is a presumption (but only a presumption) that the sum is a penalty when a single lump sum is made payable as compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.⁶⁸ It is this class of cases which gives rise to the most difficulty, and illustrations are apt to be misleading when we are dealing with a rule which depends on a rebuttable presumption. *Kemble v. Farren*⁶⁹ is the stock example. *Kemble* was the manager of the Covent Garden Theatre. He engaged *Farren* to act at the theatre for four seasons, at a salary of £3 6*s.* 8*d.* for each night. *Farren* promised to conform to the regulations of the theatre. There was a clause in the contract that if either party broke it, or any part of it, or any stipulation in it, he should pay to the other 1,000*l*, such sum “to be liquidated and ascertained damages, and not a penalty.” *Farren* refused to act during the second season. *Kemble* claimed 1,000*l*. The jury awarded him 750*l*, and it was held that he was entitled to no more than that. Here there were a number of terms in the contract, some of which were of certain, others of uncertain value. Had the 1,000*l* been allotted as the damage payable for a matter of uncertain value, it would have been recoverable, for it would have saved the expense and difficulty of bringing witnesses to prove exactly what loss had been incurred. “But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms.”⁶⁷

SPECIFIC PERFORMANCE

The nature of a decree for the specific performance of a contract is the order of a Court for the execution of the contract according to its stipulations and terms. It is not quite accurate to say that the Court directs the defaulting party to do the very thing that he promised, for the mere fact that the plaintiff is suing him shows that the defendant is probably late in performing his promise even if he obeys the order of the Court in every other particular. Moreover, the Court rarely, if ever, interferes until the time for per-

⁶⁶ *Clydebank Engineering Co. v. Don Jose, &c.* [1905], A. C. at p. 10. Mere financial inequality of the parties to the contract is not a relevant factor; *Imperial Tobacco Co., Ltd. v. Parslay* [1936], 2 All E. R. 515, 522.

⁶⁷ See *Jessel, M. R.*, in *Wallis v. Smith* (1882), 21 Ch. D. 243, 254—267; and *Astley v. Weldon* (1801), 2 B. & P. 346.

⁶⁸ [1915] A. C., at p. 87.

⁶⁹ (1829), 6 Bing. 141.

⁷⁰ (1829) 6 Bing., at p. 148. See, too, [1915] A. C., at pp. 95, 102.

formance has passed.⁶⁸ But, with this qualification, the general statement will serve.⁶⁹ Until the Judicature Act, 1873,⁷⁰ the Court of Chancery had exclusive jurisdiction over specific performance. That Act extended the jurisdiction to all Divisions of the High Court, but by another section⁷¹ it was assigned to the Chancery Division. These sections are repealed and replaced by similar provisions in the Supreme Court of Judicature (Consolidation) Act, 1925.⁷² Since the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27; replaced by later legislation), the Court has had power to award damages instead of, or in addition to, specific performance; but where the Court could not possibly have granted specific performance it has no power to award damages.⁷³

The rules as to specific performance ought scientifically to be treated under the two different heads of jurisdiction and application. Under "jurisdiction" would be stated those rules which must be observed in order to give the Court any power at all to interfere in the matter, while under "application" the principles on which the jurisdiction is exercised, assuming it to exist, would be developed. But as a matter of convenience, it is sufficient to set out some of the chief rules without adhering to this distinction.

(1) Specific performance will not be granted where damages are an adequate remedy.⁷⁴ It cannot be obtained for a mere debt or money claim.⁷⁵ But it generally is procurable in contracts for the sale or lease of land.⁷⁶ No two plots of land being exactly alike, the particular plot bargained for may have a peculiar value in the eyes of the purchaser. This is less likely to apply to goods, but the reason why specific performance is difficult to get here has nothing to do with any distinction between movables and immovables, but rests upon the general principle that if the goods are not supplied, damages are a sufficient compensation for them.⁷⁷ They would be inadequate as a substitute for an article of rarity, antiquity, or ornament, like the horn which was anciently given to the Pusey family by Canute, and which was a token of the tenure of their lands,⁷⁸ or an old silver altar-piece.⁷⁹ These were "things of that sort of value that a jury might not give two-pence beyond the weight," and it would be unfair to leave them to judge of it.⁸⁰ The Sale of Goods Act, 1893,⁸¹ enables the Court, in any action for breach of contract to deliver specific or ascertained goods, to direct that the contract shall be performed speci-

⁶⁸ Fry, *Specific Performance* (ed. 6), s. 3.

⁶⁹ 36 & 37 Vict. c. 66.

⁷⁰ Section 34.

⁷¹ 15 & 16 Geo. 5, c. 49, ss. 36-44, 56.

⁷² *Lavery v. Pursell* (1888), 39 Ch. D. 508.

⁷³ *South African Territories, Ltd. v. Wallington* [1898], A. C. 309.

⁷⁴ *Leach, V.-C., in Adderley v. Dixon* (1823), 1 Sim. & S. 607, 610.

⁷⁵ *Pusey v. Pusey* (1684), 1 Vern. 273.

⁷⁶ *Somersel (Duke of) v. Cookson* (1735), 3 P. Wms. 390.

⁷⁷ *Lord Loughborough, L.C., in Fells v. Read* (1796), 3 Ves. Jun. 70, 71.

⁷⁸ Section 52.

cally, without giving the defendant the option of retaining the goods on payment of damages.

(2) Specific performance will not be granted where it would involve a general superintendence which could not conveniently be undertaken by any Court of justice.⁷⁹ Such are contracts requiring personal services or skill, like an agreement to sing at a concert, to teach law, to write law reports.⁸⁰ In general, building contracts will not be specifically enforced.⁸¹ In Lord Hardwicke's time, there are traces of the contrary rule,⁸² and one doubtful authority indicates the same view at a much earlier period.⁸³ But it is now well settled that covenants to build or to repair are sufficiently redressed by damages, subject to the qualification stated below. Writers are not agreed as to the reason for this. Some hold it to be the rule now under discussion,⁸⁴ but perhaps it is better placed on two other principles; first, that damages are an adequate remedy, for if one man will not build a house it is quite probable that another man can be found who will; secondly, that such contracts are for the most part so uncertain that the Court would be unable to enforce its own judgment.⁸⁵ Exceptionally, specific performance is obtainable where the building work is defined, and the plaintiff has a material interest in its execution which cannot properly be compensated by damages, and the defendant has, by the contract, got from the plaintiff possession of the land on which the work is to be done.⁸⁶ The exception is more apparent than real, for if these three requisites are fulfilled the reasons for refusing specific performance disappear.

(3) The granting of specific performance is within the discretion of the Court. This does not mean that the Court can arbitrarily give or refuse it, for there is a body of case law which lays down clear rules for the exercise of this discretion. Thus it will not enforce a contract which lacks consideration,⁸⁷ even though it be under seal.⁸⁸ Nor will it enforce an agreement which lacks mutuality, and this is why an infant cannot claim specific performance of a contract, for it could not be enforced against him.⁸⁹ Other grounds for refusing it are unreasonable hardship to the defendant,⁹⁰ uncertainty in the terms of the contract,⁹¹ and

⁷⁹ Lord Selborne, L.C., in *Wolverhampton, &c., Ry. Co. v. L. & N. W. Ry. Co.* (1873), L. R. 16 Eq. 433, 439—440.

⁸⁰ *Clarke v. Price* (1819) 2 Wils. C. C. 157.

⁸¹ *Fry, Specific Performance* (ed. 6), § 88.

⁸² *Ibid.* § 98 and Add. Note C, citing *Y. B. Pasch. 8 Edw. 4, f. 4b. Br. Abr. Conscience, 14*, supports this. *Fitz. Abr. Subpena 7*, contradicts it.

⁸³ *Leake, Contracts* (ed. 8) 875—877. *Contra, Snell, Equity* (ed. 22), 542.

⁸⁴ *Fry, op. cit.* § 98.

⁸⁵ *Ibid.*, § 103, and cases there cited. *Snell, op. cit.* 543. See, too, *Hanbury, Modern Equity* (3rd ed.), 455. Obtaining possession of the land is not always essential; *Carpenters Estates, Ltd. v. Davies* [1940] Ch. 160.

⁸⁶ *Wycherley v. Wycherley* (1763), 2 Eden, 175, 177—178.

⁸⁷ *Jefferys v. Jefferys* (1841), 1 Cr. & Ph. 138.

⁸⁸ *Flight v. Bolland* (1828), 4 Russ. 298.

⁸⁹ *Howell v. George* (1815), 1 Madd. 1.

⁹⁰ *Price v. Salusbury* (1866), 14 L. T. 110; *Douglas v. Baynes* [1908], A. C. 477.

material default on the part of the plaintiff in fulfilling his share of the contract.⁹¹ These are mentioned as examples only. Fuller information is procurable in Sir Edward Fry's work, which has been already quoted.

INJUNCTION

An injunction is a judgment or order of the Court restraining the commission or continuance of some wrongful act, or the continuance of some wrongful omission.⁹² Like specific performance, it was formerly within the province of the Court of Chancery only, but the Supreme Court of Judicature (Consolidation) Act, 1925,⁹³ which replaces a similar provision in the Judicature Act, 1873,⁹⁴ enacts that the High Court may grant an injunction in all cases in which it appears to the Court to be just or convenient. These words indicate a limit on the power to issue an injunction which was long recognised in the Court of Chancery. (The remedy is a discretionary one, and it can no more be demanded as a matter of course by a plaintiff than can a decree for specific performance.⁹⁵) It will not be granted where damages are an adequate remedy, and since the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27; replaced by later legislation),⁹⁶ the Court may award damages either in addition to, or in substitution for, an injunction.

In connexion with contracts, there is a close alliance between injunctions and specific performance. Where a promise is couched in negative terms, where A. promises B. that a thing shall not be done, the grant of an injunction against A. who has broken the promise is in effect a decree for specific performance.⁹⁷ But there may well be cases in which specific performance is out of the question, and yet an injunction is procurable.

In *Martin v. Nutkin*,⁹⁸ Dr. Martin and his wife being much disturbed by the ringing of the Hammersmith church bell at five o'clock every morning, entered into a contract with the parson, churchwardens and others, by which the Martins agreed to erect a cupola on the church, and a clock and new bell, provided that the five o'clock bell should not be rung during the lives of the Martins. They carried out their side of the contract. After two years, a new churchwarden started the early ringing again. The Martins sued successfully for an injunction to restrain him from doing so. Here the Court clearly could not have ordered specific performance.⁹⁹ A very common illustration of the issue of an injunction against the breach of a negative stipulation occurs in covenants in restraint of trade which are held to be reasonable.

⁹¹ *Walker v. Jefferys* (1842), 11 L. J. Ch. 209.

⁹² 15 & 16 Geo. 5, c. 49, s. 45.

⁹³ 26 & 27 Vict. c. 66, s. 25, sub-s. 8.

⁹⁴ *Doherty v. Allman* (1878), 3 App. Cas. 709.

⁹⁵ Lord Cairns, L.C., in *Doherty v. Allman* (1878), 3 App. Cas., at p. 720.

⁹⁶ (1724), 2 P. Wms. 266.

⁹⁷ *Per* L. C. in *Lumley v. Wagner* (1852), 1 De G. M. & G. 604, 614—615.

As to stipulations in a contract which are framed in the affirmative, the appropriate remedy is specific performance (provided of course the conditions requisite for the grant of that remedy are satisfied), and not injunction. But a stipulation which is in form affirmative may be negative in substance. If this is found as a fact to be the true construction of the contract, the Court will restrain by injunction the doing of an act which infringes the stipulation." In *Lumley v. Wagner*,⁹⁹ Miss Wagner contracted to sing at Lumley's theatre during a certain period, and not to sing elsewhere without his written authority. In breach of this stipulation Miss Wagner agreed to sing at the theatre of one Gye. Lumley sued Miss Wagner for an injunction restraining her from this breach. It was contended that a Court of equity ought not to grant an injunction except in cases connected with specific performance, or where, the injunction being to compel a party to forbear from an act, it would complete the whole of the agreement remaining unexecuted. Now specific performance was obviously impossible here. No Court could make Miss Wagner sing if she did not wish to do so; nor would an injunction enforcing the negative part of her agreement necessarily make her complete the whole of it. Nevertheless, an injunction was granted, for the agreement to sing for the plaintiff and the stipulation not to sing during that time for anyone else were in effect one contract, and amounted as a whole to a negative undertaking. In more recent times, the Courts have indicated that *Lumley v. Wagner* went perilously near decreeing specific performance of a contract of personal service, however much the Lord Chancellor in that case may have disclaimed any such intention. It is "an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend," and the Court of Appeal in the decision in which these words were uttered refused to imply any negative stipulation in an agreement by the manager of a company to give the whole of his time during a certain period to the company's business.¹ In fact it would appear that, where the contract is one of personal service, nothing short of an express negative stipulation will justify the Court in issuing an injunction. An attempt to make it imply one was fruitless in *Mortimer v. Beckett*² where a boxer undertook that the plaintiff should "have the sole arrangements" for matching him in all his boxing contests for the next seven years; it was held that the plaintiff could not successfully claim an injunction to prevent the boxer from employing other persons for making such arrangements. Even where the negative stipulation is express, an injunction will not be granted if the effect of it would be "to drive the defendant

⁹⁹ The cases are collected in Kerr, *Injunctions* (ed. 6) 462 *et seq.*

¹ (1852), 1 De G. M. & G. 604.

² *Whitwood Chemical Co. v. Hardman* [1891], 2 Ch. 416, Lindley, L.J., at p. 428.

³ [1920] 1 Ch. 571.

either to starvation or to specific performance of the positive covenants.”³ Provided that the conditions specified above are satisfied, the plaintiff need not prove that any damage will flow from breach of the negative stipulation.⁴ Contracts which do not involve personal service stand on a different footing. If such is the true intention of the parties a negative stipulation will be implied by the Court and enforced by injunction. There is no objection here to the decreeing of specific performance in a disguised form, for while the Court cannot supervise the execution of personal services, that obstacle does not exist in most other contracts. Thus in *Metropolitan Electric Supply Co. v. Ginder*,⁵ the defendant agreed to take the whole of the electric energy which he required from the plaintiffs for a period of five years. It was held that he had contracted in substance not to take energy from any other person, and an injunction was issued to prevent him from getting it elsewhere. Indeed there was no affirmative contract to take anything at all.]

³ *Warner Bros. Pictures Inc. v. Nelson* [1937] 1 K.B. 209. 216.

⁴ *Marco Productions Ltd. v. Pagola* [1945] 1 K.B. 111.

⁵ [1901] 2 Ch. 799.

APPENDICES

1.—SAVIGNY'S ANALYSIS OF AGREEMENT

IN the third volume of his *System of Modern Roman Law*, Savigny deals in the most general way with the events capable of producing changes in rights and duties in the field of private law and from that point of view comes to the concepts of agreement and contract. His treatment of them may still be profitable to advanced students, and for the very reason that those who live under modern codes, no less than we in England and America whose categories were fixed long ago by an archaic frame of procedure, enjoy no such freedom. It is well to remember, by the way, that Friedrich Carl von Savigny (1779-1861) was no merely academic jurist. As High Chancellor of Prussia he was at the head of that kingdom's judicial system from 1842 to 1848, and was an active law reformer. It may be doubted whether without his practical experience he would have been the greatest European master of jurisprudence in the nineteenth century. Concerning the matter in hand, he begins with the unsorted mass of events of the kind above mentioned, under the name of *juristische Thatsachen*; an expression to which our own accustomed "acts in the law" seems well fitted to correspond. (The attempt to give a more literal version with "juridical facts" is neither English nor any intelligible language: I rather think that passing fashion is extinct.) Savigny proceeds to mark off from the genus the species of voluntary acts (*freie Handlungen*) and from these again the more limited kind which manifest an intention to bring about particular legal consequences. Such an act is called by Savigny *Willenserklärung*. Specifying yet more, we distinguish the acts in which the will of only one party is expressed from those in which the wills of two or more concur. This last species gives the conception of *Vertrag*. Savigny defines it as the concurrence of two or more persons in the expression of a common intention, whereby mutual rights and duties of those persons are determined. "*Vertrag ist die Vereinigung Mehrerer zu einer übereinstimmenden Willenserklärung, wodurch ihre Rechtsverhältnisse bestimmt werden.*" (Syst. 3. 309.) This covers a much wider field than that of contract in any proper sense. Every transaction answering this description includes an agreement, but many transactions answer to it which include far more: conveyances of property, for example, including dispositions *inter vivos* by way of trust and even gifts, and marriage. A still further specification is needful to arrive at the notion of Contract. A contract, in Savigny's way of approaching it, is an agreement which produces or is meant to produce an obligation in the classical Roman sense of a bond of personal right and duty (*obligatorischer Vertrag*). It is thus defined in his *Obligationenrecht*, § 52 (vol. ii. p. 8): "*Vereinigung Mehrerer zu einer übereinstimmenden Willenserklärung, wodurch unter ihnen eine Obligation entstehen soll.*" The use of the more general notion of *Vertrag*, as Savigny himself explains, is not to clear up anything in the learning of contracts. It is to bring out the truth that other transactions which are not contracts, or which are more than contracts, have in common with them the character of consent being an essential ingredient. The insistence on intention to create a legal duty is by no means superfluous, see *Rose and Frank Co. v. J. R. Crompton & Bros., Ltd.* [1925] A. C. 445: 94 L. J. 120 (p. 196), a case that might have caused less searching of

heart if the fundamental principles of the law had been less easy to overlook.

English-speaking lawyers have to deal with a system in which procedure was already fixed in archaic forms before any attempt was made to expound the substance of the law. The questions our text-writers were driven to ask were, what forms of action could be used for enforcing promises? what were the necessary conditions for a promise being actionable? and moreover how a plaintiff was to make sure of choosing the right form of action?

2.—AUTHORITIES ON CONTRACT BY CORRESPONDENCE (p. 27)

The first case of any importance is *Adams v. Lindsell* (1818) 1 B. & Ald. 681; 19 R. R. 415. Defendants wrote to plaintiffs, "We now offer you 800 tods of wether fleeces, &c." (specifying price and mode of delivery and payment), "receiving your answer in course of post." Here, therefore, the mode and time for acceptance were prescribed. This letter was misdirected, and so arrived late. On receiving it, the plaintiffs wrote and sent by post a letter accepting the proposal, but the defendants, not receiving an answer when they should have received it if their proposal had not been delayed, had in the meantime (between the despatch and the arrival of the reply) sold the wool to another buyer. The jury were directed at the trial that as the delay was occasioned by the neglect of the defendants, they must take it that the answer did come back by course of post. On the argument of a rule for a new trial, it was contended that there was no contract till the answer was received. To this the Court replied:—

"If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post."

As far as the case goes, it seems to amount to this: An acceptance by letter is complete as against the proposer from the date of posting the acceptance if it arrives within the prescribed time, if any, or otherwise within a reasonable time; but if the communication of the proposal is delayed by the fault of the proposer, and the communication of the acceptance is consequently delayed, such delay is not to be reckoned against the acceptor.

In the Scottish case of *Dunmore v. Alexander*, 9 Shaw & Dunlop, 109 (1830), the defendant wrote to a friend desiring her to engage a servant on terms which, that friend had already informed the writer, would be agreeable to the servant. A letter revoking this was written the next day; ultimately they were both posted and delivered to the servant at the same time. It was held that no contract was concluded, but it is not clear whether the majority of the Court meant to decide that an acceptance sent through the post is neutralized by a revocation arriving at the same time though posted later, or that the first letter was only a proposal. [In *Mason v. Benhar Coal Co.* (1882) 9 R. 890, the Court

declined to commit itself to the English rule that posting a letter of acceptance constitutes communication of the acceptance; in Scots law, the point is still open.] Neither is it clear how far and for what purposes they regarded the intermediate person as an agent for either or both of the parties. No distinction was taken between postal and other communications. The French Court of Cassation had held in 1813 that when an acceptance and the revocation of it arrive together there is no contract. Merlin, *Répertoire, Vente*, § 1, Art. 3, No. 11 *bis*, Langdell Sel. Ca. Cont. 155. But that Court avoided any general definition [until 1932, when it decided in favour of the "expedition" theory, i.e. that sending the letter of acceptance concludes the contract: Dalloz, *Jurisprudence Générale*, 1933, Pt. 1, 65—68; Continental and American rules are examined in 55 L. Q. R. (1939) 505—508.]

In *Potter v. Sanders* (1846) 6 Ha. 1; 77 R. R. 1, the posting of a letter of acceptance is said to be an act which, "unless interrupted in its progress," concludes the contract as from the date of the posting. This seems to imply that a letter not received at all would not bind the proposer.

Then comes *Dunlop v. Higgins* (1848) 1 H. L. C. 381; 73 R. R. 98, a Scottish appeal decided by Lord Cottenham. Here the proposal did not prescribe any time, but the nature of it (an offer to sell iron) implied that the answer must be speedy. The acceptance was posted, not by the earliest possible post, but in business hours on the same day when the proposal was received. The post was then delayed by the state of the roads, so that the acceptance was received at 2 p.m. instead of 8 a.m., the hour at which that post should have arrived. The decision was that the contract was binding on the proposer; and it might well have been put on the ground that the acceptance in fact reached him within a reasonable time. Lord Cottenham, however, certainly seems to have thought the contract was absolutely concluded by the posting of the acceptance (within the prescribed or a reasonable time), and that it mattered not what became of the letter afterwards. It appears to have been so understood in *Duncan v. Topham* (1849) 8 C. B. 225; 18 L. J. C. P. 310; 79 R. R. 470, where, however, the decision was on other grounds.

Later cases arose out of applications for shares in companies being made and answered by letter. *Hebb's case* (1867) L. R. 4 Eq. 9, decides only that an allotment of shares not duly despatched will not make a man a shareholder; for the letter of allotment was sent to the company's local agent, who did not deliver it to the applicant till after he had withdrawn his application. But the same judge (Lord Romilly) held in *Reidpath's case* (1870) L. R. 11 Eq. 86; 40 L. J. Ch. 39, that the applicant was not bound if he never received the letter.

In *British and American Telegraph Company v. Colson* (1871) L. R. 6 Ex. 108; 40 L. J. Ex. 97, it was found as a fact that the letter of allotment was never received. The Court (Kelly C.B., Pigott B., and Bramwell B.) held that the defendant was not bound, and endeavoured to restrict the effect of *Dunlop v. Higgins*.

In *Townsend's case* (1871) L. R. 13 Eq. 148; 41 L. J. Ch. 198, the letter of allotment miscarried, and was delayed some days by the applicant's own fault in giving a defective address. By a simple application of *Adams v. Lindsell* (expressly so treated in the judgment, L. R. 13 Eq. 154) it was held that the applicant was bound, and that a withdrawal of his application posted (and it seems delivered, p. 151) before he received the letter of allotment, was too late.

In *Wentworth's case* (1872) L. R. 7 Ch. 587, the letter of allotment was duly

received, but in the meantime the applicant had written a letter withdrawing his application on the ground of the delay (ten days) in answering it. These letters crossed. The Lords Justices (James and Mellish) held that the applicant was bound, on the authority of *Dunlop v. Higgins*, with which they thought it difficult to reconcile *British and Amer. Telegraph Co. v. Colson*.¹ On this, however, no positive opinion was given, "because although the contract is complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent that if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted" (per Mellish L. J. at 597).

In *Wall's case* (1872) L. R. 15 Eq. 18; 42 L. J. Ch. 372, Malins V.-C. held that as a fact the letter had been received, inclining, however, to think *Harris' case* an authority for the more stringent construction of *Dunlop v. Higgins*—viz., that the contract is absolute and unconditional by the mere posting. This construction was held by the Court of Appeal in *Household Fire Insurance Co. v. Grant* (1879) 4 Ex. D. 216; 48 L. J. Ex 577 (p. 28, *ante*) to be the correct one.

The American case of *Tayloe v. Merchants' Fire Insurance Co.*, 9 How. S. C. 390 (1850), is of less importance to English readers than it formerly was, the ground being now fully covered by our own decisions. The insurance company's agent wrote to the plaintiff offering to insure his house on certain terms. The plaintiff wrote and posted a letter accepting these terms, which was duly received. The day after it was posted, but before it was delivered, the house was burnt. The objection was made, among others, that there was no complete contract before the receipt of the letter, an assent of the company after the acceptance of the proposed terms being essential. But the Court held that such a doctrine would be contrary to mercantile usage and understanding, and defeat the real intent of the parties. This decides that a contract is complete as against the proposer by posting a letter which is duly delivered. It may still be useful to cite part of the judgment:—

"The fallacy of the argument, in our judgment, consists in the assumption that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show that in all cases of contracts entered into between parties at a distance by correspondence it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present. . . . It is obviously impossible ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. . . . It seems to us more consistent with the acts and declarations of the parties to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated, instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

"For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part after an unconditional acceptance by the party to whom it is addressed?" (9 How. S. C. 400, 401.)

[Later decisions in the United States also show that the rule is the same as in England: Restatement of Contracts, § 64; Williston, Contracts, 234, note 4, contains a list of the American authorities.]

¹ It seems not to have been disputed that the letter of allotment was in fact sent within a reasonable time.

There seems to be a fair *consensus* of authority, such as there is, for holding that the *place* to which a contract made by correspondence should be referred is that whence the acceptance is despatched: *Savigny*, Syst. 8. 253, 257; *Newcomb v. De Roos* (1859) 2 E. & E. 270; 29 L. J. Q. B. 4. So, if a contract is wrongfully repudiated by letter or telegraph, the breach is referred to the place of despatch: *Martin v. Stout* [1925] A. C. 359, Jud. Comm. Conversely, where an offer to buy goods is made by a letter posted in the City of London, and accepted by sending a servant of the seller with the goods to the writers' place of business in the City, the whole cause of action arises in the City: *Taylor v. Jones* (1875) 1 C. P. D. 87; 45 L. J. C. P. 110. So in criminal law a false pretence contained in a letter sent by post is made at the place where the letter is posted: *Reg. v. Holmes* (1883) 12 Q. B. D. 23; 53 L. J. M. C. 37. So of a notice of dismissal: *Holland v. Bennett* [1902] 1 K. B. 867, C. A. But a solicitor's letter of demand sent by post is, for the purpose of a restrictive covenant binding the writer not to practise within certain limits, an act of demand at the place of receipt: *Edmundson v. Render* [1905] 2 Ch. 320; 74 L. J. Ch. 585.

3—HISTORY OF THE EQUITABLE DOCTRINE OF SEPARATE ESTATE¹ (p. 71)

When the practice of settling property to the separate use of married women first became common, it seems probable that neither the persons interested nor the conveyancers had any purpose in their minds beyond excluding the husband's marital right so as to secure an independent income to the wife. The various forms of circumlocution employed in old-fashioned settlements to express what is now sufficiently expressed by the words "for her separate use" will at once suggest themselves as confirming this. In course of time, however, it was found that by recognizing this separate use the Court of Chancery had in effect created a new kind of equitable ownership, to which it was impossible to hold that the ordinary incidents of ownership did not attach. Powers of disposition were accordingly admitted including alienation by way of mortgage or specific charge as well as absolutely; and we find it laid down in general terms in the latter part of the eighteenth century that a *feme covert* acting with respect to her separate property is competent to act as a *feme sole*.² Nevertheless the equitable ownership of real estate by means of the separate use, carrying as incidents the same full right of disposition by deed or will that a *feme sole* would have, was fully recognized only by much later decisions.³ From a mortgage or specific charge on separate property to a formal contract under seal, such as if made by a person *sui iuris* would even then have bound real estate in the hands of his heir, we may suppose that the transition did not seem violent; and instruments expressing such a contract to be entered into by a married woman came to be regarded as in some way binding on any separate property she might have. In what way they were binding was not settled for a good while, for reasons best stated in the words of V.-C. Kindersley's judgment in *Vaughan v. Vanderstegen*.⁴

¹ The contents of this note, being purely historical, are not substantially affected by the Law Reform (Married Women and Tortfeasors) Act of 1935.

[See, too, Holdsworth, Hist. of Eng. Law, xii, 324-326].

² *Hulme v. Tenant* (1778) 1 Wh. & T. L. C. In *Peacock v. Monk* (1750-1) 2 Ves. Sr. 190, there referred to by Lord Thurlow, no such general rule is expressed. As to the recognition of separate property by Courts of Common Law, see *Duncan v. Cassin* (1875) L. R. 10 C. P. 554; 44 L. J. C. P. 396.

³ *Taylor v. Moads* (1865) 4 D. J. S. 597; 34 L. J. Ch. 203; *Pride v. Bubb* (1871) L. R. 7 Ch. 64; 41 L. J. Ch. 105.

⁴ (1853) 2 Drew. 165, 180; 100 R. R. 65, 71.

"The Courts at first ventured so far as to hold that if" a married woman "made a contract for payment of money by a written instrument with a certain degree of formality and solemnity, as by a bond under her hand and seal, in that case the property settled to her separate use should be made liable to the payment of it; and this principle (if principle it could be called) was subsequently extended to instruments of a less formal character, as a bill of exchange or promissory note, and ultimately to any written instrument. But still the Court refused to extend it to a verbal agreement or other assumpsit, and even as to those more formal engagements which they did hold to be payable out of the separate estate, they struggled against the notion of their being regarded *as debts*, and for that reason they invented reasons to justify the application of the separate estate to their payment without recognizing them as debts or letting in verbal contracts. One suggestion was that the act of disposing of or charging separate estate by a married woman was in reality the execution of a power of appointment,⁶ and that a formal and solemn instrument in writing would operate as an execution of a power, which a mere assumpsit would not do. . . . Another reason suggested was that as a married woman has the right and capacity specifically to charge her separate estate the execution by her of a formal written instrument must be held to indicate an intention to create such special charge, because otherwise it could not have any operation."

Both these suggestions are on the later authorities untenable, as indeed V.-C. Kindersley then (1853) judged them to be.⁶ One or two other suggestions—such as that a married woman should have only such power of dealing with her separate estate as might be expressly given her by the instrument creating the separate use—were thrown out about the beginning of the nineteenth century,⁷ during a period of reaction in which the doctrine was thought to have gone too far, but they did not find acceptance; and the dangers which gave rise to these suggestions were and still are provided against in another way by the curious device of the restraint on anticipation.⁸

The modern *locus classicus* on the subject is the judgment of Turner L.J. in *Johnson v. Gallagher*,⁹ which had the full approval of the Judicial Committee¹⁰ and of the Court of Appeal in Chancery.¹¹ The general result was to this effect:

"Not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their separate estates" (3 D. F. J. 514); and property settled to a married woman's separate use

⁶ E.g. *Duke of Bolton v. Williams* (1793) 2 Ves. Jr. at 149.

⁷ Cp. *Murray v. Barlee* (1834) 3 M. & K. 209, where the arguments show the history of the doctrine; *Owens v. Dickenson* (1840) 1 Cr. & Ph. 48, 53; 54 R. R. at 198, where the notions of power and charge are both dismissed as inapplicable by Lord Cottenham. The theory of specific charge was revived as late as 1866: *Shattock v. Shattock*, L. R. 2 Eq. 182, 193; 35 L. J. Ch. 509, but this must be regarded as overruled: *Robinson v. Pickering* (1881) 16 Ch. Div. 660; 50 L. J. Ch. 527. It was really discarded by Lord Eldon in 1803: *Nantes v. Corrock*, 9 Ves. 182; 7 R. R. 156.

⁷ See *Jones v. Harris* (1804) 9 Ves. 486, 497; 7 R. R. 282, 288; *Parkes v. White* (1804-5) 11 Ves. 209, 220 *sqq.*; and collection of cases 5 Ves. 17, note.

⁸ See Lord Cottenham's judgment in *Tullett v. Armstrong* (1838) 4 My. & Cr. 393, 405; 48 R. R. 127. Restraint on anticipation can exist only as incidental to a trust for separate use. Such a trust cannot be supplied in order to give effect to a restraint: *Stogdon v. Lee* [1891] 1 Q. B. 661, 670; 60 L. J. Q. B. 669, C. A. This clause, which soon became common form, was invented by Lord Thurlow; the exact date is not known. See for details Walter G. Hart, "The origin of the restraint upon anticipation," L. Q. R. xl. 221.

⁹ (1861) 3 D. F. J. 494, 509 *sqq.*; 30 L. J. Ch. 298.

¹⁰ *London Chartered Bank of Australia v. Lempière* (1873) L. R. 4 P. C. 572; 42 L. J. P. C. 49.

¹¹ *Picard v. Hine* (1869) L. R. 5 Ch. 274.

for her life, with power to dispose of it by deed or will, is for this purpose her separate estate.¹²

These "general engagements" are subject to the forms imposed by the Statute of Frauds or otherwise on the contracts made *in pari materia* by persons competent to contract generally, but not to any other form: there is no general rule that they must be in writing.

A "general engagement" is not binding on the separate estate unless it appear "that the engagement was made with reference to and upon the faith or credit of that estate" (3 D. F. J. 515).

Whether it was so made is a question of fact to be determined on all the circumstances of the case: it is enough "to show that the married woman intended to contract so as to make herself—that is to say, her separate property—the debtor" (L. R. 4 C. P. 597).

Such intention is presumed in the case of debts contracted by a married woman living apart from her husband (3 D. F. J. 521). (This tallies with the rule of common law, which in this case excludes even as to necessities the ordinary presumption of authority to pledge the husband's credit: see notes to *Manby v. Scott* in 2 Sm. L. C.)

The like intention is inferred where the transaction would be otherwise unmeaning, as where a married woman gives a guaranty for her husband's debt¹³ or joins him in making a promissory note.¹⁴

The "engagement" of a married woman differs from a contract, inasmuch as it gives rise to no personal remedy against the married woman, but only to a remedy against her separate property.¹⁵ But it creates no specific charge, and therefore the remedy may be lost by her alienation of such property before suit (3 D. F. J. 515, 519, 520-2).¹⁶ On the same principle the exercise by a married woman of a general testamentary power of appointment does not make the appointed fund liable to her engagements, for it is never her separate property.¹⁷

In cases where specific performance would be granted as between parties *sui iuris*, a married woman may enforce specific performance of a contract made with her where the consideration on her part was an engagement binding on her separate estate according to the above rules; and the other party may in like manner enforce specific performance against her separate estate.¹⁸

A married woman's engagement relating to her separate property will have the same effect as the true contract of an owner *sui iuris* in creating

¹² *Mayd v. Field* (1876) 3 Ch. D. 587, 593; 45 L. J. Ch. 699; s. v. *Roper v. Doncaster* note ¹⁷.

¹³ *Morrell v. Cowan* (1877) 6 Ch. D. 166 (reversed 7 Ch. Div. 151; 47 L. J. Ch. 73, but only on the construction of the document), where no attempt was made to dispute that the guaranty, though not expressly referring to the separate estate, was effectual to bind it.

¹⁴ *Davies v. Jenkins* (1877) 6 Ch. D. 728.

¹⁵ Hence, before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), the married woman, not being a real debtor, was not subject to the bankruptcy law in respect of her separate estate: *Ex parte Jones* (1879) 12 Ch. Div. 484; 48 L. J. Bk. 109.

¹⁶ *Acc. Robinson v. Pickering* (1881) 16 Ch. Div. 660; 50 L. J. Ch. 527, which decided that a creditor of a married woman on the faith of her separate estate is not thereby entitled to a charge on her separate property, or to an injunction to restrain her from dealing with it.

¹⁷ *Roper v. Doncaster* (1888) 39 Ch. D. 482; 58 L. J. Ch. 31; *qu.* how far consistent with *Mayd v. Field*, note ¹². As to the effect of s. 4 of the Married Women's Property Act, 1882, see now *Re Hughes* [1898] 1 Ch. 529; 67 L. J. Ch. 279, C. A.; *Re Hodgson* [1899] 1 Ch. 166; 68 L. J. Ch. 313; *Re Fieldwick* [1909] 1 Ch. 1, C. A.

¹⁸ The cases cited in Sug. V. & P. 206, so far as inconsistent with the modern authorities (see *Picard v. Hine*) (1869) L. R. 5 Ch. 274, where the form of decree against the separate estate is given; *Pride v. Bubb* (1871) L. R. 7 Ch. 64; 41 L. J. Ch. 105), must be considered as overruled.

an obligation which will be binding on the property in the hands of an assignee with notice.¹⁰

If a married woman becomes *sui iuris* by the death of the husband, judicial separation or otherwise, what becomes of the debts of her separate estate? It appears that they do not become legal debts: for this would be to create a new right and liability quite different from those originally created by the parties; but that the creditor's right is to follow in the hands of the owner or her representatives the separate estate held by her at the time of contracting the engagement, and still held by her when she became *sui iuris*, but not any other property. Property subject to a restraint on anticipation cannot in any case be bound.⁴⁰

On principle a married woman's engagement with respect to her separate estate, while not bound by any peculiar forms, is on the other hand bound in every case by the ordinary forms of contract; in other words, no instrument or transaction can take effect as an engagement binding separate estate which could not take effect as a contract if the party were *sui iuris*. That is to say, the creditor must first produce evidence appropriate to the nature of the transaction which would establish a legal debt against a party *sui iuris*, and then he must show, by proof or presumption as explained above, an intention to make the separate estate the debtor. There is, however, a decision the other way. In *McHenry v. Davies*,²¹ a married woman, or rather her separate estate, was sued in equity on a bill of exchange indorsed by her in Paris. It was contended for the defence, among other things, that the bill was a French bill and informal according to French law. Lord Romilly held that this was immaterial, for all the Court had to be satisfied of was the general intention to make the separate estate liable, of which there was no doubt. This reasoning is quite intelligible on the assumption that engagements bind separate estate only as specific charges; the fact that the instrument creating the charge simulated more or less successfully a bill of exchange would then be a mere accident.²² The judgment bears obvious marks of this exploded theory.²³ In *Johnson v. Gallagher* it is assumed that a married woman's engagements concerning her separate interest in real estate must satisfy the conditions of the Statute of Frauds.²⁴ An engagement which if she were *sui iuris* would owe its validity as a contract to the law merchant must surely in like manner satisfy the forms and conditions of the law merchant. It is submitted, therefore, that *McHenry v. Davies*²⁵ is not law on this point.

The Statute of Limitation, or rather its analogy, applies to claims against the separate estate.²⁶

It is said that a married woman's separate estate cannot be made liable as on an obligation implied in law, as, for instance, to the repayment of money paid by mistake or on a consideration which has wholly failed.²⁷

¹⁰ Per Jessel M.R. *Warne v. Routledge* (1874) L. R. 18 Eq. 500; 43 L. J. Ch. 604.

²⁰ *Pike v. Fitzgibbon* (1881) 17 Ch. Div. 454; 50 L. J. Ch. 394. Earlier cases are indecisive. For the view taken in the Court below in *Johnson v. Gallagher*, where the bill was filed after the death of the husband see 3 D. F. J. 495, and the decree appealed from at 497.

²¹ (1870) L. R. 10 Eq. 88.

²² Note, however, that in the case of parties *sui iuris* a bill of exchange cannot be treated as an equitable assignment: *Shand v. Du Buisson* (1874) L. R. 18 Eq. 283; 43 L. J. Ch. 508. Nor a cheque: *Hopkinson v. Foster* (1874) L. R. 19 Eq. 74.

²³ Cp. *Shattock v. Shattock*, p. 676, where Lord Romilly took the same view.

²⁴ (1861) 3 D. F. J. at 514.

²⁵ (1870) L. R. 10 Eq. 88.

²⁶ *Re Lady Hastings* (1887) 35 Ch. Div. 94.

²⁷ 3 D. F. J. 512, 514, referring to *Duke of Bolton v. Williams* (1793) 2 Ves. Jr. 138; *Jones v. Harris* (1804) 9 Ves. 486, 493; 7 R. R. 282, and *Aguilar v. Aguilar* (1820) 5 Madd. 414.

But the decisions to this effect belong (with one exception) to what we have called the period of reaction, and are distinctly grounded on the exploded notion that a "general engagement," even if express, is not binding on the separate estate.

The exception is the modern case of *Wright v. Chard*,²² where V.-C. Kindersley held that a married woman's separate estate was not liable to refund rents which had been received by her as her separate property, but to which she was not in fact entitled. But the language of the judgment reduces it to this, that in the still transitional state of the doctrine, and in the absence of any precedent for making the separate estate liable in any case without writing (this was in 1859, *Johnson v. Gallagher* not till 1861), the V.-C. thought it too much for a court of first instance to take the new step of making it liable "in the absence of all contract;" and he admitted that "the modern tendency has been to establish the principle that if you put a married woman in the position of a *feme sole* in respect of her separate estate, that position must be carried to the full extent, short of making her personally liable." The test of liability would seem on principle to be whether the transaction out of which the demand arises had reference to or was for the benefit of the separate estate.

The spirit of the modern authorities was, on the whole, in the direction of holding that a married woman's "engagement" differs from an ordinary contract only in the remedy being limited to her separate property. Her creditor was in a position like that of a creditor of trustees for a society, or the like, who has agreed to look only to a specified fund for payment. And on this view the Married Women's Property Act of 1882 was framed.

4—LIMITATION OF CORPORATE POWERS BY DOCTRINES OF PARTNERSHIP AND AGENCY (p. 103)

A case in which this reason appears most clearly is *Simpson v. Denison* (1852) 10 Ha. 51; 90 R. R. 276. The suit was instituted by dissentient shareholders to restrain the carrying out of an agreement between their company (the Great Northern) and another railway company, by which the Great Northern was to take over the whole of that company's traffic, and also to restrain the application of the funds of the Great Northern Company for obtaining an Act of Parliament to ratify such agreement. The V.-C. Turner treated it as a pure question of partnership: "How would this case have stood," he says in the first paragraph of the judgment, "if it had been the case of an ordinary limited partnership?" The Railways Clauses Consolidation Act became in this view a statutory form of partnership articles, to which every shareholder must be taken to have assented; and the general ground of the decision was that "no majority can authorize an application of partnership funds to a purpose not warranted by the partnership contract." For the purposes of the case before the Court this analogy was perfectly legitimate; and the dissent expressed by Parke B. (in *South Yorkshire, &c. Co. v. G. N. R. Co.* (1853) 9 Ex. 88; 22 L. J. Ex. 315; 96 R. R. 575) must be considered only as a warning against an unqualified extension of it to questions between the corporate body and strangers. In *Pickering v. Stephenson* (1872) L. R. 14 Eq. 322, 340; 41 L. J. Ch. 493, the same rule is thus set forth by Wickens V.-C.—"The principle of jurisprudence which I am asked here to apply is that the governing body of a corporation that is in fact a trading partnership

²² (1859) 4 Drew. 673, 685; 29 L. J. Ch. 82; on appeal, 1 D. F. J. 567; 113 R. R. 501, but not on this point.

cannot in general use the funds of the community for any purpose other than those for which they were contributed. By the governing body I do not of course mean exclusively either directors or a general council,²⁹ but the ultimate authority within the society itself, which would ordinarily be a majority at a general meeting. According to the principle in question the special powers given either to the directors or to a majority by the statutes or other constituent documents of the association, however absolute in terms, are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association." Nothing is said here on the extent to which a corporation may be bound by the unanimous assent of its members.³⁰

Any dissenting shareholder may call for the assistance of the Court to restrain unconstitutional acts of the governing body,³¹ but he must do so in his proper capacity and interest as a shareholder and partner. If the Court can see that in fact he represents some other interest, and has no real interest of his own in the action, it will not listen to him; as when the proceedings are taken by the direction of a rival company in whose hands the nominal plaintiff is a mere puppet, and which indemnifies him against costs: *Forrest v. Manchester, &c. Ry. Co.* (1861) 4 D. F. J. 126: so where the suit was in fact instituted by the plaintiff's solicitor on grounds of personal hostility, *Robson v. Dodds* (1869) L. R. 8 Eq. 301; 38 L. J. Ch. 647. But if he has any real interest and is proceeding at his own risk, he is not disqualified from suing by the fact that he has collateral motives, or is acting on the suggestion of strangers or enemies to the company, or even has acquired his interest for the purpose of instituting the suit: *Colman v. E. C. Ry. Co.* (1846) 10 Beav. 1; 16 L. J. Ch. 73; 76 R. R. 78; *Seaton v. Grant* (1867) L. R. 2 Ch. 459; 36 L. J. Ch. 638; *Bloxham v. Metrop. Ry. Co.* (1868) L. R. 3 Ch. 337. For full collection of cases down to 1902, see Lindley on Companies (6th ed.), 763 [and, for later cases, 10 English and Empire Digest, 1166 sqq., and Supplement, 1941]. As a rule the plaintiff in actions of this kind sues on behalf of himself and all other shareholders whose interests are identical with his own; but there seems to be no reason why he should not sue alone in those cases where the act complained of cannot be ratified at all, or can be ratified only by the unanimous assent of the shareholders: *Hoole v. G. W. Ry. Co.* (1867) L. R. 3 Ch. 262. There is another class of cases in which abuse of corporate powers or authorities is complained of, but the particular act is within the competence of, and may be affirmed or disaffirmed by, "the ultimate authority within the society itself" (in the words of Wickens V.-C. just now cited), and therefore the corporation itself is *prima facie* the proper plaintiff. See Lindley on Companies, 574 sqq.; *Gray v. Lewis* (1869) L. R. 8 Ch. 1035, 1051; *Macdougall v. Gardiner* (1875) L. R. 10 Ch. 606; 1 Ch. D. 13, 21; *Russell v. Wakefield Waterworks Co.* (1875) L. R. 20 Eq. 474; 44 L. J. Ch. 496. "The majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly."³² The

²⁹ Referring to the peculiar constitution of the company then in question.

³⁰ The articles of association of a company under the Companies Acts are a contract not only between the members, but between the company and its members: *Hickman v. Kent, &c. Assn.* [1915] 1 Ch. 881; 84 L. J. Ch. 688.

³¹ So may a member of a chartered company: *Jenkin v. Pharmaceutical Society* [1921] 1 Ch. 393; 90 L. J. Ch. 47.

³² *Mellish L. J.* 1 Ch. D. at 25. As to a shareholder's right to use the company's name as plaintiff, see *Pender v. Lushington* (1877) 6 Ch. D. 70; 46 L. J. Ch. 317; *Duckett v. Gover* (1877) 6 Ch. D. 82; 46 L. J. Ch. 407; *Silber Light Co. v. Silber* (1879) 12 Ch. D. 717; 48 L. J. Ch. 385; *Harben v. Phillips* (1882-3) 23 Ch. D. 14, 29, 38; *Burland v. Earle* [1902] A. C. 83; 71 L. J. P. C. 1.

exception is when a majority have got the government of the corporation into their own hands, and are using the corporate name and powers to make a profit for themselves at the expense of the minority; then an action is rightly brought by a shareholder on behalf of himself and others, making the company a defendant: *Menier v. Hooper's Telegraph Works* (1874) L. R. 9 Ch. 350; 43 L. J. Ch. 330; *Mason v. Harris* (1879) 11 Ch. Div. 97; 48 L. J. Ch. 589; *Baillie v. Oriental Telephone Co.* [1915] 1 Ch. 503; 84 L. J. Ch. 409, C. A. We mention these cases only to distinguish them from those with which we are now concerned.

With regard to the doctrine of limited agency, and its peculiar importance in the case of companies constituted by public documents, all persons dealing with them being considered to know the contents of those documents and the limits set to the agent's authority by them, it may be useful to give Lord Hatherley's concise statement of the law (when V.-C.) in *Fountaine v. Carmarthen Ry. Co.* (1868) L. R. 5 Eq. 316, 322; 37 L. J. Ch. 429.

"In the case of a registered joint stock company, all the world of course have notice of the general Act of Parliament and of the special deed which has been registered pursuant to the provisions of the Act, and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the directors must see that those limited powers are not being exceeded. If, on the other hand, as in the case of *Royal British Bank v. Turquand*,³¹ the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do. That is the result of Lord Campbell's judgment in *Royal British Bank v. Turquand*." For fuller exposition see Lindley on Companies (6th ed.), 214 *sqq.*

The contrast of the two classes of cases is well known in *Royal British Bank v. Turquand*³² and *Balfour v. Ernest* (1859) 5 C. B. N. S. 601; 28 L. J. C. P. 170. In the former case there was power for the directors to borrow money if authorized by resolution: and it was held that a creditor taking a bond from the directors under the company's seal, was not bound to inquire whether there had been a resolution. Jervis C.J. said in the Exchequer Chamber (the rest of the Court concurring):—

"We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here on reading the deed of settlement would find not a prohibition from borrowing, but a permission to do so on certain conditions."

The same principle has been followed in many later cases (*Ex parte Eagle Insurance Co.* (1858) 4 K. & J. 549; 27 L. J. Ch. 829; *Campbell's case, &c.* (1873) L. R. 9 Ch. 1, 24; 43 L. J. Ch. 1; *Totterdell v. Fareham Brick Co.* (1866) L. R. 1 C. P. 674; 35 L. J. C. P. 278; *Re County Life Assce. Co.* (1870) L. R. 5 Ch. 288; 39 L. J. Ch. 471, a very strong case, for the persons who issued the policy were assuming to carry on business as directors of the company without any authority at all; *Romford Canal Co.* (1883) 24 Ch. D. 85; 52 L. J. Ch. 729), and it was decisively affirmed by the House of Lords in *Mahony v. East Holyford Mining Co.* (1875) L. R. 7 H. L. 869. In that case a bank had honoured cheques drawn by persons acting as directors of the company but who had never been

³¹ (1855) 5 E. & B. 248; 6 *ibid.* 237; 24 L. J. Q. B. 327; 25 *ibid.* 327; 103 R. R. 461.

properly appointed; and these payments were held to be good as against the liquidator, the dealings having been on the face of them regular, and with *de facto* officers of the company. Shareholders who allow persons to assume office and conduct the company's business are, as against innocent third persons, no less bound by the acts of these *de facto* officers than if they have been duly appointed. It is for the shareholders to see that unauthorised persons do not usurp office, and that the business is properly done.³⁴ Similarly where the proper quorum of directors fixed by internal regulations of the company was not present: *County of Gloucester Bank v. Rudry Merthyr, &c. Co.* [1895] 1 Ch. 629; 64 L. J. Ch. 451. Creditors are entitled to rely on the authority of a managing director purporting to exercise powers which under the articles he might have: *Biggerstaff v. Rowatt's Wharf* [1896] 2 Ch. 93, 102; 65 L. J. Ch. 536; *Dey v. Pullinger Engineering Co.* [1921] 1 K. B. 77; 89 L. J. K. B. 241. But a creditor cannot rely on the supposed exercise of power to delegate authority which was in fact unknown to him at the time: *Houghton & Co. v. Nothard, Lowe & Wills, Ltd.* [1927] 1 K. B. 246; 96 L. J. K. B. 25 (affirmed on another point [1928] A. C. 1; 97 L. J. K. B. 76); *Kreditbank Cassel v. Schenkers* [1927] 1 K. B. 826; 96 L. J. K. B. 501, both in C. A.

In *Balfour v. Ernest* the action was on a bill given by directors of an insurance company for a claim under a policy of another company, the two companies having arranged an amalgamation; this attempted amalgamation, however, had been judicially determined to be void: *Ernest v. Nicholls*, 6 H. L. C. 401; 108 R. R. 175; revg. S. C. nom. *Port of London Co.'s case* (1854) 5 D. M. G. 465. The directors had power by the deed of settlement to borrow money for the objects and business of the company and to pay claims on policies granted by the company, and they had a power to make and accept bills, &c. which was not restricted in terms as to the objects for which it might be exercised. It was held that, taking this with the other provisions of the deed, they could bind the company by bills of exchange only for its ordinary purposes, and not in pursuance of a void scheme of amalgamation, that the plaintiffs must be taken to have known of their want of authority, which might have been ascertained from the deed, and that they therefore could not recover. "This bill is drawn by procuration," said Willes J., "and unless there was authority to draw it the company are not liable" . . . this is the bare case of one taking a bill from Company A. in respect of a debt due from Company B., there being nothing in the deed (which must be taken to have been known to the plaintiffs) to confer upon the directors authority to make it."

The connection with ordinary partnership law is brought out in the introductory part of Lord Wensleydale's remarks in *Ernest v. Nicholls* (1857) 6 H. L. C. 401, 417; 108 R. R. 175, 182.

"The law in ordinary partnerships, so far as relates to the powers of one partner to bind the others, is a branch of the law of principal and agent. Each member of a complete partnership is liable for himself, and, as agent for the rest, binds them upon all contracts made in the course of the ordinary scope of the partnership business. . . . Any restrictions upon the authority of each partner, imposed by mutual agreement amongst themselves, could not affect third persons, unless such persons had notice of them; then they could take nothing by contract [sc. as against the firm] which those restrictions forbade. [The law in this

³⁴ Opinion of judges L. R. 7 H. L. at 880; per Lord Hatherley, at 897-8.

³⁵ In form it was a bill drawn by two directors on the company's cashier, and sealed with the company's seal.

form, *i.e.*, the presumption of every partner being the agent of the firm, being obviously inapplicable to joint-stock companies.] The legislature then devised the plan of incorporating these companies in a manner unknown to the common law with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorized to bind all the shareholders by requiring the copartnership deed to be registered . . . and made accessible to all." The continuation of the passage, however, goes too far; in fact, it disregards the distinction established by *Royal British Bank v. Turquand*, and the Courts have distinctly declined to adopt it: *Agar v. Athenæum Life Assce. Soc.* (1858) 3 C. B. N. S. 725; 27 L. J. C. P. 95; 111 R. R. 817; *Prince of Wales Assce. Co. v. Harding* (1857) E. B. & E. 183; 27 L. J. Q. B. 297; 113 R. R. 594. See *Chapleo v. Brunswick Building Society* (1881) 6 Q. B. Div. 696; 50 L. J. Q. B. 372, for an example of the society not being bound by a loan contracted beyond its borrowing powers: the directors, having held themselves out as authorized, were found personally liable.

Transactions in the conduct of a company's affairs which in their inception were invalid as against any dissentient shareholder may nevertheless be made binding on the partnership and decisive of its collective rights, as between the company and its own past or present members, by the subsequent assent of all the shareholders, though such assent be informal and shown only by acquiescence. The leading examples on this head are given by the well-known cases in the House of Lords which arose in the winding-up of the Agriculturists' Cattle Insurance Company.

It is to be observed that these cases turned on the internal constitution and affairs of the company, and there was no occasion to consider to what extent or in what transactions the assent of shareholders was capable of binding the company as against strangers. They therefore stand apart from the question of positive statutory limitations of corporate powers as between the company and outsiders. Moreover, the irregular act which was ratified was unauthorized as to the manner and form of it, but belonged to an authorized class.³⁸ The general nature of the facts was thus: At a meeting of the company an arrangement was agreed to, afterwards called the Chippenham arrangement, by which shareholders who elected to do so within a certain time might retire from the company on specified terms by a nominal forfeiture of their shares. The deed of settlement contained provisions for forfeiture of shares, but not such as to warrant this arrangement. It was held—

In *Evans v. Smallcombe* (1868) L. R. 3 H. L. 249, that the Chippenham arrangement could be supported (as having become part of the internal regulations of the company) only by the assent of all the shareholders, but that in fact there was knowledge and acquiescence sufficiently proving such assent. A shareholder who had retired on the terms of the Chippenham arrangement was therefore not liable to be put on the list of contributories. (Cp. *Brotherhood's case* (1862) 4 D. F. J. 566, an earlier and similar decision in the same winding-up.)

In *Spackman v. Evans* (1868) L. R. 3 H. L. 171; 34 L. J. Ch. 321, that a later and distinct compromise made with a smaller number of dissentient shareholders had not in fact been communicated to all the shareholders as distinct from the Chippenham arrangement, and could not be deemed to have been ratified by that acquiescence which ratified the Chippenham arrangement; and that a shareholder who had retired under this later compromise was therefore rightly made a contributory.

³⁸ See per Lord Romilly (L. R. 3 H. L. 244-5). See also the judgment of Archibald J. in *Riche v. Ashbury Railway Carriage Co.* (1875) L. R. 9 Ex. 289; 43 L. J. Ex. 177.

In *Houldsworth v. Evans* (1868) L. R. 3 H. L. 263, that time was of the essence of the Chippenham arrangement, so that when a shareholder was allowed to retire on the terms of the Chippenham arrangement after the date fixed for members to make their election, this, in fact, amounted to a distinct and special compromise, which ought to have been specially communicated to all the shareholders: this case therefore followed *Spackman v. Evans*.³⁷ Cp. *Stewart's case* (1866) L. R. 1 Ch. 511.

The question of the shareholders' knowledge or assent in each case involved delicate and difficult inferences of fact, and on these the opinions of the Lords who took part in the decisions were seriously divided. It may perhaps also be admitted that on some inferences of mixed fact and law there was a real difference; but it may safely be affirmed that on any pure question of law there was none.³⁸ These cases appear to establish in substance the following propositions: (1) For the purpose of binding a company as against its own shareholders, irregular transactions of an authorized class may be ratified by the assent of all the individual shareholders. They need not all assent at the same time and place: *Parker and Cooper v. Reading* [1926] 1 Ch. 975; 96 L. J. Ch. 23. (2) Such assent must be proved as a fact. Acquiescence with knowledge or full means of knowledge may amount to proof of assent, and lapse of time, though not conclusive, is material. The converse proposition that the assent of a particular shareholder will bind him to an irregular transaction as against the company is likewise well established, but does not fall within our present scope. See *Campbell's case, &c.* (1873) L. R. 9 Ch. 1; 43 L. J. Ch. 1.

The later case of *Phosphate of Lime Co. v. Green* (1871) L. R. 7 C. P. 43, was of much the same kind though in a different form. The action was by the company against past shareholders for a debt, and the defence rested on an accord and satisfaction which had been effected by an irregular forfeiture of the defendant's shares, and which in the result was upheld on the ground of the shareholder's acquiescence. It was not necessary to consider the distinction between irregular acts which can be ratified and acts contrary to the constitution of the company which cannot be ratified in any way, nor was it brought to the attention of the Court.³⁹ As to the equitable obligation of a company to repay money irregularly borrowed on its behalf and in fact used to pay its legal debts, see *Reversion, &c. Co. v. Maison Cosway* [1913] 1 K. B. 364, C. A.

With regard to cases in which ratification is impossible by reason of the corporation being absolutely disabled from undertaking the transaction, the existence of such cases has been recognized almost from the beginning of modern corporation law. "A company incorporated by Act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be."⁴⁰ The application of this principle to companies under the Companies Act, 1862 (the most important class of cases in practice), was fixed by the House of Lords in 1875 in *Ashbury, &c. Co. v. Riche*, pp. 101-102 *ante*. The House decided that, by the frame and intention of the Act as a whole, the memorandum of association is the fundamental constitution of the company, and the company is incompetent to undertake anything outside its objects as

³⁷ (1868). See also L. R. 7 C. P. 51, 52, and note the remark of Willes J. at 53; 34 L. J. Ch. 321.

³⁸ See per Willes J., L. R. 7 C. P. 60.

³⁹ See further on the subject of ratification by companies, Lindley on Companies (6th ed.), 231 *seq.*

⁴⁰ So laid down as well settled doctrine by Lord Cranworth in *E. C. Ry. Co. v. Hawkes* (1885) 5 H. L. C. 331; 24 L. J. Ch. 601; 101 R. R. 189.

thereby defined. As a consequence of this, any provision in the articles for applying the company's capital to a purpose not warranted by the memorandum is itself invalid: *Guinness v. Land Corporation of Ireland* (1882) 22 Ch. Div. 349. For some time past it has been the practice of company draftsmen to frame the memorandum in the most comprehensive terms, in order to prevent questions of this kind from arising; but the decisions remain in full force, and the practice and forms in use cannot be adequately understood without reference to them. As to when the Attorney-General is entitled to interfere, see *A.-G. v. G. E. Ry. Co.* (1880) 11 Ch. Div. 449; 49 L. J. Ch. 545; *A.-G. v. London County Council* [1902] A. C. 165; 71 L. J. Ch. 268; this case also decides that a county council under the Local Government Act, 1888, is a purely statutory body and has not the general powers of a corporation at common law: *A.-G. v. Mersey Ry. Co.* [1907] 1 Ch. 81, C. A. (revd. on point of substance in *H. L.* [1907] A. C. 415; 76 L. J. Ch. 568).

5—CLASSIFICATION OF CONTRACTS IN ROMAN AND MEDIEVAL LAW⁴¹ (p. 108)

Formal contracts (*legitimae conventiones*) gave a right kind of action irrespective of their subject-matter. In Justinian's time the only kind of formal contract in use was the Stipulation,⁴² or verbal contract by question and answer, the question being put by the creditor and answered by the debtor (as *Dari spondes? spondeo: Promittis? promitto: Facies? faciam*). The origin of the Stipulation is believed to have been religious,⁴³ though the precise manner of its adoption into the civil law remains uncertain. In our authorities it appears as a formal contract capable of being applied to any kind of subject-matter at the pleasure of the parties. Its application was in course of time extended by the following steps. 1. The question and answer were not required to be in Latin.⁴⁴ 2. An exact verbal correspondence between them was not necessary.⁴⁵ 3. An instrument in writing purporting to be the record of a Stipulation was treated as strong evidence of the Stipulation having actually taken place,⁴⁶ and it might be presumed that the form of question and answer had been duly observed even without express words to that effect.⁴⁷ Hence the medieval development of operative writings.

Informal agreements (*pacta*) did not give any right of action without the presence of something more than the mere fact of the agreement. This something more was called *causa*.⁴⁸ Practically the term covers a

⁴¹ [See also Buckland, *Text-Book of Roman Law* (2nd ed.), 412 *sqq.*]

⁴² The *litterarum obligatio* (Gai 3. 128) was obsolete. What appears under that title in the Institutes (3. 21) is a general rule of evidence unconnected with the ancient usage: see Moyle's *Justinian*, Exc. viii.

⁴³ Savigny's derivation of the Stipulation from the *nexum* is abandoned, so far as I know, by all recent writers. It seems quite possible that the earliest type of contract is to be sought in covenants made between independent tribes or families. Cf. Gai. 3. 94 on the use of the word *spondeo* in treaties. If this were so, one would expect the covenant to be confirmed by an oath, of which Muirhead (on Gai. 3. 92) finds a trace on other grounds in the form *promittis? promitto*.

⁴⁴ Gai. 3. 93; I. 3. 15, de v. o. § 1.

⁴⁵ C. 8. 98, de cont. et comm. stipul. 10.

⁴⁶ C. 8. 98, de cont. et comm. stipul. 14; I. 3. 19, de inut. stipul. § 12. Probably Greek and provincial use of written agreements had much to do with this.

⁴⁷ Paul Sent. V. 7, § 2. For detailed discussion see Seuffert, *Zur Geschichte der obligatorischen Verträge*, § 3.

⁴⁸ As to the modern doctrine of *causa*, especially in French law, see F. P. Walton in *L. Q. R.* xli. 306, holding it to be of doubtful utility. [See, too, Buckland & McNair, *Roman Law and Common Law*, 175. Note also 173, where it is pointed out that the four "consensual" contracts in Roman Law make it impossible to accept without qualification the proposition that a *nudum pactum* was unenforceable.]

somewhat wider ground than our modern "consideration executed": but it has no general notion corresponding to it, at least none co-extensive with the notion of contract; it is simply the mark, whatever that may be in the particular case, which distinguished any particular class of agreements from the common herd of *pacta* and makes them actionable. Informal agreements not coming within any of the privileged classes were called *nuda pacta* and could not be sued on. The term *nudum pactum* is sometimes used, however, with a special and rather different meaning, to express the rule that a contract without delivery will not pass property.⁴⁰

The further application of this metaphor by speaking of the *causa* when it exists as the clothing or vesture of the agreement is without classical authority but very common; it is adopted to the full extent by our own early writers.⁴¹

The privileged informal contracts were the following: 1. *Real* contracts, where the *causa* consisted in the delivery of money or goods: namely, *mutui datio*, *commodatum*, *depositum*, *pignus*, corresponding to our bailments. This class was expanded within historical times to cover the so-called innominate contracts denoted by the formula *Do ut des*, &c.,⁴² so that there was an enforceable obligation *re contracta* wherever, as we should say, there was a consideration executed: yet the procedure in the different classes of cases was by no means uniform.⁴³

2. *Consensual* contracts, being contracts of constant occurrence in daily life in which no *causa* was required beyond the nature of the transaction itself. Four such contracts were recognized, the first three of them at all events⁴⁴ from the earliest times of which we know anything, namely, Sale, Hire, Partnership, and Mandate. (*Emptio Venditio*, *Locatio Conductio*, *Societas*, *Mandatum*). To this class great additions were made in later times. Subsidiary contracts (*pacta adiecta*) entered into at the same time and in connexion with contracts of an already enforceable class became likewise enforceable: and divers kinds of informal contracts were specially made actionable by the Edict and by imperial constitutions, the most material of these being the *constitutum*, covering the English heads of *account stated* and *guaranty*. Justinian added the *pactum donationis*, it seems with a special view to gifts to pious uses.⁴⁵ Even after all these extensions, however, matters stood thus: "The Stipulation, as the only formal agreement existing in Justinian's time, gave a right of action. Certain particular classes of agreements also gave a right of action even if informally made. All other informal agreements (*nuda pacta*) gave none. This last proposition, that *nuda pacta* gave no right of action, may be regarded as the most charac-

⁴⁰ Traditionibus et usucapionibus dominia rerum, non nudis pactis, transferuntur. Cod. 2. 3. de pactis, 20. But the context is not preserved, and the particular *pactum* in question may have been *nudum* in the general sense too. The contrary rule of the Common Law has not so far been traced to an earlier time than the second quarter of the fifteenth century: see Prof. Ames in *Essays in Anglo-American Legal Hist.* iii. 312, 313. Cp. note ⁴¹, p. 561.

⁴¹ "Pactum nudum est non vestitum stipulatione vel re vel litteris vel consensu vel contractus coherencia": Azo, *Summa in Cod. ap. Seuffert op. cit.* 41; Maitland, *Bracton* and Azo, 143. "Obligatio quatuor species habet quibus contrahitur et plura vestimenta," Bracton, 99a. "Obligacioun diet estre vestue de v. maneres de garnisementz," Britton 1. 156.

⁴² Aut enim do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias; in quibus quaeritur quae obligatio nascatur. D. 19. 5. de praescr. verbis, 5 pr. Blackstone (*Comm.* ii. 444) took this formula for a classification of *all* valuable considerations, and his blunder was copied without reflection by later writers.

⁴³ Dig. 1. c. §§ 1-4.

⁴⁴ See Muirhead on *Gai.* 3. 216.

⁴⁵ C. 8. 54, de donat. 35, § 5. The establishment of emphyteusis as a distinct species of contract is of minor importance for our present purpose.

teristic principle of the Roman law of Contract."⁵⁵ It is desirable to bear in mind that in Roman, and therefore also in early English law-texts, *nudum pactum* does not mean an agreement made without consideration. Many *nuda pacta*, according to the classical Roman law, would be quite good in English law, as being made on sufficient consideration; while in many cases obligations recognized by Roman law as fully binding (e.g. from mandate or *negotiorum gestio*) would be unenforceable, as being without consideration, in the Common Law.

When the Roman theory came to be adopted or revived in Western Christendom, the natural obligation admitted to arise from an informal agreement was, under the influence of the canonists, gradually raised to full validity, and the difference between *pactum* and *legitima conventio* ceased to exist.⁵⁶ The process, however, was not completed until English law had already struck out its own line.

The identification of Stipulation with formal writing, complete on the Continent not later than the 9th century,⁵⁷ was adopted by our medieval authors. In Glanvill we find that a man's seal is conclusive against him.⁵⁸ Bracton, after setting forth almost in the very words of the Institutes how "*Verbis contrahitur obligatio per stipulationem*," &c. adds: "*Et quod per scripturam fieri possit stipulatio et obligatio videtur, quia si scriptum fuerit in instrumento aliquem promississe, perinde habetur ac si interrogatione praecedente responsum sit.*"⁵⁹ There is no doubt that he means only a writing under seal, though it is not so expressed: Fleta does say in so many words that a writing unsealed will not do.⁶⁰ The equivalent for the Roman Stipulation being thus fixed, the classes of Real and Consensual contracts are recognized, in the terms of Roman law so far as the recognition goes: the Consensual contracts are but meagrely handled for form's sake, as the Roman rules could not be reconciled with English practice.⁶¹ We hear of nothing corresponding to the later Roman extensions of the validity of informal agreements. Such agreements in general give no right of action: in Glanvill it is expressly said: "*Privitas conventiones non solet curia domini regis tueri*";⁶² the context makes it doubtful whether even agreements under seal were then recognized by the King's Court unless they had been made before the Court itself. In Bracton too, notwithstanding his elaborate copying of Roman sources, we read: "*Iudicialis etiam esse poterit*

⁵⁵ Sav. Obl. 2, 231. Muirhead, on Gai. 3, 134, says that "amongst peregrins a *nudum pactum* was creative of action": which seems to be a slip. Provincial usage, so far as is known, was less advanced than Roman; thus the contract of sale was (as in Germanic custom) real and not consensual: Gilson, *L'étude du droit romain comparé aux autres droits de l'antiquité* (1899), 217.

⁵⁶ Seuffert op. cit. cp. Harv. Law Rev. vi. 390, 391. See Esmein, *Etudes sur les contrats dans le très ancien droit français*, Paris, 1883, for the earlier medieval history.

⁵⁷ Details and authorities in Brunner, *Rom. u. German. Urkunde*.

⁵⁸ L. x. c. 12.

⁵⁹ 99 b. 100 a. Later students of Roman law seem to have been dissatisfied; at any rate the following curious marginal note occurs in an early 14th century MS. of Bracton in the Cambridge University Library (Dd. 7. 6): *Differt pactum a conventione quia pactum solum consistit in sermonibus, ut in stipulationibus, conventio tam in sermone quam in opere, ut cum in scriptis redigitur.*

⁶⁰ Lib. 2. c. 60, § 25. *Non solum sufficiet scriptura, nisi sigilli munimine stipulantis (see pp. 109-111, ante) roboretur cum testimonio fide dignorum praesentium.*

⁶¹ Bracton's law of sale, like Glanvill's is the old Germanic law in which the contract is not consensual but real: fo. 61 b., Güterbock, 113. Mandate is still unknown to the Common Law.

⁶² Lib. x. c. 18, and more fully *ib.* c. 8. "*Curia domini regis*" is significant, for the ecclesiastical courts, and it seems local and private courts, did take cognizance of breaches of informal agreements as being against good conscience, *ib.* c. 12; Blackstone, Comm. 1. 52, and authorities there cited; Archdeacon Hale's *Series of Precedents and Proceedings*, where several instances will be found; Harv. Law Rev. vi. 402.

stipulatio vel conventionalis. Judicialis, quae iussu iudicis fit vel praetoris. Conventionalis quae ex conventione utriusque partis concipitur, nec iussu iudicis vel praetoris, et quarum totidem sunt genera quot paene rerum contrahendarum. De quibus omnibus omnino curia regis se non intromittit, nisi aliquando de gratia" (fo. 100a).⁸²

6—EARLY AUTHORITIES ON ASSIGNMENTS OF CHOSSES IN ACTION (P.170)

See now S. J. Bailey "Assignment of debts in England from the twelfth to the twentieth century," L. Q. R. xlvii. 516, xlviii. 248 (1931-2), bringing out in detail *int. al.* the importance of Jews' debts in forming the practice. [See also Edward H. Warren, *Margin Customers* (1941, Plimpton Press, Norwood, Mass.), ch. iv.]

In Mich. 3 Hen. IV. 8, pl. 34, is a case where a grantee of an annuity from the king sued on it in his own name. No question seems to have been raised of his right to do so.

In Hil. 37 Hen. VI. 13, pl. 3, it appears that by the opinion of all the justices an assignment of debts (not being by way of satisfaction for an existing debt) was no consideration (*quid pro quo*) for a bond, forasmuch as no duty was thereby vested in the assignee: and the Court of Chancery acted on that opinion by decreeing the bond to be delivered up. The case is otherwise interesting, as it shows pretty fully the relations then existing between the Court of Chancery and the Courts of Common Law, and the cardinal doctrine that the jurisdiction of equity is wholly personal is stated with emphatic clearness.

In Hil. 21 Ed. IV. 84, pl. 38, the question was raised whether an annuity for life granted without naming assigns could be granted over: and the dictum occurs that the right of action, whether on a bond or on a simple contract, cannot be granted over.

Mich. 39 Hen. VI. 26, pl. 36. If the king grant a duty due to him from another, the grantee shall have an action in his own name: "*et issint ne puit nul autre faire.*"

So, Mich. 2 Hen. VII. 8, p. 25. "*Le Roy poit grantier sa accion ou chose qui gist en accion; et issint ne poit nul autre person.*"

In Rolle Abr. Action sur Case, 1. 20, pl. 12, this case is stated to have been decided in B. R., 42 Eliz., between Mowse and Edney, *per curiam*: A. is indebted to B. by bill (*i.e.*, the now obsolete form of bond called a single bill), and B. to C. B. assigns A.'s bill to C. Forbearance on C.'s part for a certain time is no consideration for a promise by A. to pay C. at the end of that time (*s. v. contra, ib.* pl. 60); for notwithstanding the assignment of the bill, the property of the debt remains in the assignor.

In none of these cases is there a word about maintenance or public policy. On the contrary, it is assumed throughout that the impossibility of effectually assigning a chose in action is inherent in the legal nature of things. [I have pointed out in *Present Law of Abuse of Procedure*, 45, that Coke's theory, that the law of maintenance prevented the assignment of choses in action in early times, is probably an anachronism, for it implies a development of the law of maintenance which it scarcely possessed until Henry VI.'s reign—the very period in which it was expressly held that it did not apply to assignment of a debt.] Finally, in *Termes de la Ley*, tit. *Chose in Action*, the rule is briefly and positively stated to this effect: Things in action which are certain the king may

⁸² [Pollock's citation has been amended in conformity with the text in Woodbine's edition of Bracton (1922).]

grant, and the grantee have an action for them in his own name ; but a common person can make no grant of a thing in action, nor the king himself of such as are uncertain. No reason is given.

The exception in favour of the Crown may be derived from the universal succession accruing to the Crown on forfeitures. This would naturally include rights of action, and it is easy to understand how the practice of assigning over such rights might spring up without much examination of its congruity with the legal principles governing transactions between subjects. Direct proof is not forthcoming, but the conjecture seems now to be generally accepted. [Cf. Winfield, *Present Law of Abuse of Procedure*, 46.]

Before the expulsion of the Jews under Edward I. they were treated as a kind of serfs of the Crown (*ipsi Iudaei et omnia sua regis sunt*, Pseudo-L. Edw. Conf. c. 25 ; *tayllables au Roy come les soens serfs et a nul autre*: Statutes of Jewry, *temp. incert.*, dated by Prynne, 3 Ed. I.), and the king accordingly claimed and exercised an arbitrary power of confiscating, releasing, assigning, or licensing them to assign, the debts due to them. Cp. charter of Frederick II. Pet. de Vineis Epist. lib. 6, no. 12 : "omnes et singuli Iudaei degentes ubique per terras nostrae iurisdictioni subiectas Christianae legis et Imperii praerogativa servi sunt nostrae Camerae speciales." And see on this subject Y. B. 33 Ed. I. xli. 355, and Prynne's "Short Demurrer to the Jews," &c. (Lond. 1656, a violent polemic against their re-admission to England), *passim*.

In Hil. 9 Hen. VI. 64, pl. 17, Thomas Rothewel sues J. Pever for maintaining W. H. in an action of detinue against him, Rothewel, for "*un box ove charters et muniments*." Defence that W. H. had granted to Pever a rentcharge, to which the muniments in question related, and had also granted to Pever the box and the deeds, then being in the possession of Rothewel to the use of W. H., wherefore Pever maintained W. H., as he well might. To this Paston, one of the judges, made a curious objection by way of dilemma. It was not averred that W. H. was the owner of the deeds, but only that Rothewel had them to his use ; and so the property of them might have been in a stranger : "*et issint ceo fuit chose en accion et issint tout void*." The precise meaning of these words is not very clear, but the general drift is that, for anything that appeared, W. H. had no assignable interest whatever ; and it looks as if the strong expression *tout void* was meant to take a higher ground, distinguishing between a transaction impeachable for maintenance and one wholly ineffectual from the beginning. It may have been supposed that an assignment by a person out of possession could have no effect. But if W. H. was the true owner, Paston continued, then the whole property of the deeds, &c. passed to Pever, who ought to have brought detinue in his own name." Babington C.J. and Martyn J., the other judges present, were of a contrary opinion, holding that any real interest in the matter made it lawful to maintain the suit. The attempt to assign a chose in action is here compared by the counsel for the plaintiff to the grant of a reversion without attornment ; showing that the personal character of the relation was considered the ground of the rule in both cases.

In Mich. 34 Hen. VI. 30, pl. 15, Robert Horn sued Stephen Foster for maintaining the administrators of one Francis in an action against him. R. Horn : the circumstances being that Horn was indebted to Francis by bond, and Francis being indebted to Stephen in an equal sum assigned

¹¹ Another argument put by the plaintiff's counsel, though not very material, is too quaint to be passed over : Whatever interest Pever might have had by the grant of the rent and the deeds relating to it, yet he had none in the box, and therefore in respect of the box, at all events, there was unlawful maintenance on his part.

the debt and delivered the bond to him, authorizing him, if necessary, to sue on it in his (Francis') name, to which Horn agreed; and now Francis had died intestate, and Stephen was suing on the bond in the name of the administrators with their consent. And this being pleaded for the defendant, was held good. Prisot, in giving judgment, compared the case of the *cestui que use* of lands, whether originally or claiming by purchase through him to whose use the feoffment was originally made, taking part in any suit touching the lands. On this Fitzherbert remarks (*Mayntenauns*, 14) "*Nota icy que per ceo il semble que un dulse puit estre assigne pour satisfaction.*" So it is said in Hil. 15 Hen. VII. 2, pl. 3 that if one is indebted to me, and deliver to me an obligation in satisfaction of the debt, wherein another is bound to him, I shall sue in my debtor's name, and pay my counsel and all things incident to the suit; and so may do he to whom the obligation was made, for each of us may lawfully interfere in the matter.

Brooke, Abr. 140 b, observes, referring to the last-mentioned case: "*Et sic vide que chose in accion poet estre assigne oustre pur loyal cause, come iust det, mez nemy pur maintenance.*" The writer's language shows that assignment of a chose in action meant to him nothing else than empowering the assignee to sue in the assignor's name. He was at no pains to exclude in terms such an impossible supposition as that the assignee could sue in his own name.

It was long supposed (as is implied in Fitzherbert's and Brooke's language—and see the case in 37 Hen. VI. cited p. 562) that the assignment of a debt by way of sale, as opposed to satisfaction of an existing liability, was maintenance. Even under the Restoration the Court of Chancery would not protect the assignment of any chose in action unless in satisfaction of some debt due to the assignee: *Freem. C. C.* 145, pl. 185, see Ames in *Harv. Law Rev.* i. 6, note; and further on the whole matter, the same learned writer in *Essays in Anglo-American Legal History*, iii. 580 sqq., and Sir W. Holdsworth in *Harv. Law Rev.* xxxiii. 997.

7—BRACTON ON FUNDAMENTAL ERROR (P.403)

The passage is under the head *De acquirendo rerum dominio*, fo. 15 b, 16, vol. ii. pp. 62—63 of Prof. Woodbine's critical edition (1922). It is now needless to reprint the text here. There are divers variations from the passage of the Digest which Bracton followed; they are not easy to explain, but the weight of MS. authority disclosed by the learned editor's full collation shows that they are not accidental. Whatever light can be thrown on them will doubtless appear in his notes in due time.

8—MISTAKE IN WILLS (P.418)

Properly speaking, there is no jurisdiction in any court to rectify a will on the ground of mistake. A Court of Probate may reject words of which the testator is proved to have been ignorant, whether inserted by the fraud or by the mistake of the person who prepared the will.⁶⁵ But it has no power to insert words⁶⁶ or otherwise remedy a mistake "by modifying the language used by the draftsman and adopted by the testator so as to make it express the supposed intention of the testator.

Such a mode of dealing with wills would lead to the most dangerous consequences, for it would convert the Court of Probate into a court

⁶⁵ *E.g. Morrell v. Morrell*, 7 P.D. 68; 51 L. J. P. 49, following *Fulton v. Andrew* (1875) L. R. 7 H. L. 448; 44 L. J. P. 17; *Briseo v. Baillie-Hamilton* [1902] P. 234; 71 L. J. P. 121.

⁶⁶ *In the goods of Schett* [1901] P. 190; 70 L. J. P. 46.

of construction of a very peculiar kind, whose duty it would be to shape the will into conformity with the supposed intentions of the testator."⁶¹ Exactly the same rule has been laid down in equity.⁶²

The cases in which it is said that the Court will interfere to correct mistakes in wills may be classified thus:

1. Cases purely of construction according to the general intention collected from the will itself.⁶³

2. Cases of equivocal description, of words used in a special habitual sense, or of a wrongly given name which may be corrected by a sufficient description.⁶⁴

3. Cases of dispositions made on what is called a false cause,⁶⁵ i.e., on the mistaken assumption of a particular state of facts existing, except on which assumption the disposition would not have been made. These are analogous to the cases of contract governed by *Couturier v. Hastie*,⁶⁶ and just as in those cases, the expressed intention is treated as having been dependent on a condition which has failed. Similarly revocation of a will proceeding on a false assumption of fact is inoperative if—but only if—the intention to revoke is shown to have been contingent on the truth of the assumed fact.⁶⁷

4. An erroneous specification of number in the description of a class of legatees may be disregarded. (Hawkins on Wills, ed. Sanger, p. 83.)

But the true view of all these cases appears to be not that the words are corrected, but that the intention when clearly ascertained is carried out notwithstanding the apparent difficulty caused by the particular words.

9—ON THE SUPPOSED EQUITABLE DOCTRINE OF "MAKING REPRESENTATIONS GOOD" (P.422)

This once frequently alleged head of equity, in so far as it purports to establish any rule or principle apart from the ordinary rules as to the formation of contracts on the one hand, and the principle of estoppel by assertion as to existing facts on the other, is now known to be imaginary. In the principal class of cases the "representation" is of an intention to make a provision by will for persons about to marry, in reliance on which representation the marriage takes place. The leading authority is *Hammersley v. De Biel*,⁶⁸ decided by the House of Lords in 1845 on appeal from the Court of Chancery. In the Court below⁶⁹ Lord Cottenham had laid down the proposition that "a representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of the Court for the purpose of realizing such representation." This appears to be the source of all the similar statements which have since been made.⁷⁰ Taken with its context, however,

⁶¹ *Harter v. Harter* (1873) L. R. 3 P. & D. 11, 21; 44 L. J. P. 1; following *Guardhouse v. Blackburn* (1866) L. R. 1 P. & D. 109; 35 L. J. P. 116.

⁶² *Newburgh v. Newburgh* (1820) 5 Madd. 364; 21 R. R. 310.

⁶³ See Hawkins on Construction of Wills, Introduction.

⁶⁴ Not only an equivocal name may be explained, but a name which applies to only one person may be corrected by a description sufficiently showing that another person is intended: *Charter v. Charter* (1874) L. R. 7 H. L. 364.

⁶⁵ *Campbell v. French* (1797) 3 Ves. 321; 4 R. R. 5.

⁶⁶ (1856) 5 H. L. C. 673; 25 L. J. Ex. 253; 101 R. R. 329; pp. 241, 394.

⁶⁷ *Southernden (in the estate of)* [1925] P. 177; 95 L. J. P. 1, C.A.

⁶⁸ (1845) 12 Cl. & F. 45; 69 R. R. 18.

⁶⁹ 12 Cl. & F. at 62.

⁷⁰ The turn of language is in itself not novel. It seems to be modelled on that which had long before been used in cases of a different class and for a different purpose. See *Evans v. Bicknell* (1801) 6 Ves. 174; 5 R. R. 245.

it need not mean more than that an exchange of proposals and statements by which the conduct of parties is determined may, as containing all the requisites of a good agreement, amount to a contract, though not to a formal contract. To Mr. Justice Stephen Lord Cottenham's words appeared "to mean only that contracts of this nature may be made like other contracts by informal documents, or partly by documents and partly by conduct."⁷⁷ And in this sense the rule seems to have been understood in the House of Lords both in the same and in subsequent cases. Lord Brougham and Lord Campbell speak of the transaction in plain terms as a contract. In the Rolls Court it had also been dealt with on that footing.⁷⁸ Still more pointed is the remark made by Lord St. Leonards in 1854:—"Was it merely a representation in *Hammersley v. De Biel*? Was it not a proposal with a condition which, being accepted, was equivalent to a contract?"⁷⁹ In the terms of the Indian Contract Act, it was the case of a proposal accepted by the performance of the conditions. The statement "I will leave you 10,000*l.* by my will, if you marry A.," if made and acted on as a promise, becomes a binding contract (the marriage undertaken on the faith of that promise being the consideration), and so does a statement in less plain language which amounts to the same thing. On the other hand the statement "If you marry A. I think, as at present advised, I shall leave you 10,000*l.*," is not a promise and cannot become a contract: neither can it act as an estoppel, for it cannot matter to the other party's interest whether the statement of an intention which may be revoked at any time is at the moment true or false. And the same is true of any less explicit statement which is held on its fair construction to amount to this and no more. Such was the result of the case where Lord St. Leonards put the question just cited.⁸⁰ And in that case the true doctrine was again distinctly affirmed by Lord Cranworth.⁸¹

"By what words are you to define whether a party has entered into an engagement as distinct from a contract, but which becomes a contract by another person acting upon it? Where a man engages to do a particular thing, he must do it; that is a contract; but where there are no direct words of contract, the question must be, what has he done? He has made a contract, or he has not; in the former case he must fulfil his contract; in the latter there is nothing that he is bound to fulfil." Again: "There is no middle term, no *tertium quid* between a representation so made as to be effective for such a purpose, and being effective for it, and a contract, they are identical."

He proceeded to comment on *Hammersley v. De Biel*, and to express a decided opinion that the language there used by Lord Cottenham was not meant to support, and did not support, the notion that words or conduct not amounting to a true contract may create an equitable obligation which has the same effect. "The only distinction I understand is this, that some words which would not amount to a contract in one transaction may possibly be held to do so in another." In the case of *Jorden v. Money*,⁸² which came before the House of Lords some months later, it was held, first, that the statement there relied on as binding could not work an estoppel, because it was a statement not of fact but

⁷⁷ *Alderson v. Maddison* (1880) 5 Ex. D. 293, 299; 50 L. J. Q. B. 466.

⁷⁸ *Nom. De Biel v. Thomson* (1841) 3 Beav. 469.

⁷⁹ *Mumson v. Hedges* (1854) 4 H. L. C. at 1051; 94 R. R. 539; cp. 4 H. L. C. 1059; 94 R. R. 544-5.

⁸⁰ *Mumson v. Hedges* (1854) 4 H. L. C. 1039; 94 R. R. 532.

⁸¹ At 1055-6; 94 R. R. 542-3.

⁸² (1854) 5 H. L. C. 185; 23 L. J. Ch. 865; 101 R. R. 116. A pretty full summary is given by Stephen J. 5 Ex. D. at 301.

of intention; secondly, that on the evidence it did not amount to a promise, and therefore could not be binding as a contract. Lord St. Leonards dissented both on the evidence and on the law. His opinion seems on the whole to come to this: "My inference from all the facts is that this statement was a promise; but if not, I say it is available by way of estoppel, for I deny the existence of any rule that equitable estoppel can be by statement of fact only and not of intention." On this point, however, the opinion of the majority (Lord Cranworth and Lord Brougham) is conclusive.⁸³ A promise *de futuro* cannot be an estoppel.⁸⁴

In a much earlier case of the same class before Lord Eldon⁸⁵ the language used is indecisive: "arrangement" and "engagement" seem preferred to "agreement." In two later ones decided by Sir John Stuart⁸⁶ an informal statement or promise as to a settlement on a daughter's marriage, and an informal promise to leave property by will to an attendant as recompense for services, were held to be enforceable. The Vice-Chancellor certainly seems to have adopted the opinion that a "representation" short of contract had somehow a binding force. He appears further to have held that, inasmuch as these were not properly cases of contract, it was immaterial to consider whether the Statute of Frauds applied to them, and to have thought that the opinion of Lord Cranworth in *Jorden v. Money* was inconsistent with the decision in *Hammersley v. De Biel*.⁸⁷ But these opinions are inconsistent with the true meaning and effect of the cases in the House of Lords which have already been cited: and one of them is now expressly overruled.⁸⁸ Other judicial expressions are to be found both earlier and later, which in some degree countenance them; but these have been, without exception, unnecessary for the decision of the cases in which they occurred. It is remarkable that the authoritative explanation of *Hammersley v. De Biel*⁸⁹ given in *Maunsell v. Hedges*⁹⁰ was commonly left unnoticed.

Coverdale v. Eastwood (1872)⁹¹ was a case of precisely the same type as *Hammersley v. De Biel*. Bacon V.-C. decided it on the ground that

⁸³ And see Mr. Justice Stephen's criticism, 5 Ex D. at 303.

⁸⁴ See per Lord Macnaghten, *Geo. Whitechurch, Ltd. v. Cavanagh* [1902] A. C. 117, 130; 71 L. J. K. 400; and *Chadwick v. Manning* [1896] A. C. 231; 65 L. J. P. C. 42, J. C.

⁸⁵ *Luders v. Anstey* (1799) 4 Ves. 501; 4 R. R. 276.

⁸⁶ *Prole v. Soady* (1859) 2 Giff. 1; 128 R. R. 1; *Loffus v. Maw* (1862) 3 Giff. 592; 133 R. R. 193. In *Loffus v. Maw* there is a suggestion that the "representation" affects the specific property as an equitable charge. Similar notions occur in some of Lord Romilly's judgments.

⁸⁷ *Loffus v. Maw* (1862) 3 Giff. at 603-4. In *Prole v. Soady*, a strange and entangled case, no point was made on the Statute of Frauds. But there it appears to have been established as a fact that the wife's father represented to the intended husband, an Englishman, that a certain trust disposition of Scotch land in the proper Scottish form was irrevocable. This was, as regards the person to whom it was made, a representation of foreign law, and therefore equivalent to a representation of fact. And thus the decision may have been right on the ground of estoppel. But it is far from easy to discover on what ground it really proceeded. The case went to the Appeal Court, but was compromised: see L. R. 1 Ch. 145. The still later case of *Skidmore v. Bradford* (1869) L. R. 8. Eq. 134, decided by the same judge was merely a case of contract.

⁸⁸ *Loffus v. Maw* is clearly disapproved by Lord Selborne and Lord O'Hagan in *Maddison v. Alderson* (1883) 8 App. Ca. at 473, 483. Cf. *Coles v. Pilkington* (1874) L. R. 19 Eq. 174; see at 178; 44 L. J. Ch. 381; it is now enough to say that it was decided by Malins V.-C. on the authority of *Loffus v. Maw*, which, if possible, it exceeds in audacity.

⁸⁹ (1845) 12 Cl. & F. 45; 69 R. R. 18.

⁹⁰ (1854) 4 H. L. C. 1039; 94 R. R. 532.

⁹¹ L. R. 15 Eq. 121; 42 L. J. Ch. 118.

the transaction amounted to a contract, and so it was expressed in the decree. But he also thought that there existed, and was applicable to the case in hand, "this larger principle, that where a man makes a representation to another, in consequence of which that other person contracts engagements, or alters his position, or is induced to do any other act which either is permitted by or sanctioned by the person making the representation, the latter cannot withdraw from the representation, but is bound by it conclusively." Later, in *Dashwood v. Jermyn*²² (1879), which was another marriage case, he held that the connexion between the statement relied on as a promise and the marriage alleged to have taken place on the faith of it was not sufficiently made out. He stated the general rule thus:—"If a man makes a representation on the faith of which another man alters his position, enters into a deed, incurs an obligation, the man making it is bound to perform that representation, no matter what it is, whether it is for present payment or for the continuance of the payment of annuity, or to make a provision by will. That in the eye of a Court of Equity is a contract, an engagement which the man making it is bound to perform." This appears to qualify to some extent the dicta of the same judge in *Coverdale v. Eastwood*. Here we read no longer of two distinct kinds of obligation, by contract and by "representation," but of one kind of obligation, and that a contractual one, arising from the representations made by one party with the intent that they should be acted upon, and the conduct of the other who does act upon them. If the learned judge thought that the same facts might amount to a contract in equity and not at law, he was clearly mistaken. In *Alderson v. Maddison* (1880)²³ there was an agreement to leave property by will as a reward for services. Here Stephen J. set forth the view that it must be a contract or nothing; and he held that a contract was proved by the facts of the case. The decision was reversed by the Court of Appeal on the ground that, the case being within the Statute of Frauds, there was no sufficient part performance: and the same view was taken by the House of Lords. No encouragement whatever, to say the least, was given to the doctrine of "representation." Finally, in *Re Fickus*,²⁴ where a faint attempt was made to revive it, Cozens-Hardy J. summarily disposed of it with a reference to the decision in the House of Lords.

So far the authorities as to direct enforcement of "representations." We do not count among them *Pigott v. Stratton*,²⁵ decided by the Court of Appeal in 1859, in which Lord Campbell incidentally took a minimizing view of the effect of *Jorden v. Money*.²⁶ That case, so far as it did not proceed on express covenant, was one of equitable estoppel. *Mills v. Fox* (1887)²⁷ was also decided expressly on the ground of estoppel by representation of fact. The representation was not of intention at all, but that a certain state of facts with its legal consequences existed and would continue to exist. But another class of decisions now calls for mention. These lay down, or seem to lay down, a rule to the effect that where a contract has been entered into upon the representation of one party that he will do something material to the other party's interest under it, and he does not make good that representation, he cannot enforce specific performance of the contract: and in one case the con-

²² (1879) 12 Ch. D. 776.

²³ 5 Ex. D. 293; 7 Q. B. Div. 174; 8 App. Ca. 467; 50 L. J. Q. B. 466.

²⁴ [1900] 1 Ch. 331, 334; 69 L. J. Ch. 161.

²⁵ 1 D. F. J. 33; 29 L. J. Ch. 1; 125 R. R. 336.

²⁶ At 51. But Lord Selborne seems to adopt the opinion of Lord Cranworth to its full extent in *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (1873) L. R.

6 H. L. at 360; 43 L. J. Ch. 269.

²⁷ 37 Ch. D. 153; 57 L. J. Ch. 56.

tract has even been set aside at the suit of the party misled. It is difficult in these cases to see why the so-called representation does not amount to a collateral agreement, or even to a term in the principal contract itself. In the first set of cases, where specific performance was refused, a vendor or lessor had represented that he would do something for the purchaser's or lessee's benefit, either in the way of repair or improvement on the property itself," or by executing works on adjoining property as part of a general plan." In these cases it has been thought immaterial, since the remedy of specific performance is "not matter of absolute right," to consider whether the collateral "independent engagement" could or could not have been sued on as a contract or warranty.¹ In the one case which goes farther the contract was a partial re-insurance effected by one insurance society (A.) with another (B.) for one-third of the original risk, the secretary of society A. stating when he proposed the re-insurance, that one-third was to be re-insured in like manner with another office C., and the remaining one-third retained by A., the first insurers. This last one-third was afterwards re-insured by A. with C. without communication with B. It was held that society B. was entitled to set aside the policy of re-insurance given by it on the faith that society A. would retain part of the liability. And it was said to make no difference that such an intention was really entertained at the time: for the change of intention ought to have been communicated. "If a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances."²

This case, decided by the Lords Justices in 1864, is that which gives rise to most difficulty. No reason appears why the retaining of the specified part of the risk by the re-insuring office should not have been deemed a term or condition of the contract.³ Indeed it seems to have been an integral part of the proposal, and evidence was offered that by the constant usage of insurance offices it was so understood. The judgments, however, certainly do not proceed on that footing. Possibly it might be said that the representation in this case being of something to be done not in a more or less distant future, but at the same time with and as part of the proposed transaction, was in the nature of a representation of fact. It might be put thus: "We are re-insuring one-third with C.; one-third of the risk we keep; will you, B., take the other third?" And thus put, it might be regarded as an alternative case of contract or estoppel, in which (for some reason not evident from the report) the Court preferred the less simple course.

In the other cases it is by no means clear that the existence of a true collateral agreement or warranty is excluded; in at least one similar case⁴ the question is treated as one of agreement entirely. In *Lamare v.*

¹ *Lamare v. Dixon* (1873) L. R. 6 H. L. 414; 43 L. J. Ch. 203.

² *Beaumont v. Dukes* (1822) Jac. 422; 23 R. R. 110; *Myers v. Watson* (851) 1 Sim. N.S. 523; 89 R. R. 173.

³ *Lord Cranworth*, 1 Sim. N. S. 529; *Lord Cairns*, L. R. 6 H. L. 428.

⁴ *Trail v. Baring* (1864) 4 D. J. S. 318, 329; 146 R. R. 334, per *Turner L.J.* approved by *Fry L.J.* *Scottish Petroleum Co.* (1883) 23 Ch. Div. at 438.

⁵ *Cp. Barnard v. Faber* [1893] 1 Q. B. 340; 62 L. J. Q. B. 159, C. A.

⁶ *Petcock v. Penson* (1848) 11 Beav. 355; 83 R. R. 193.

Dixon,⁵ which came before the House of Lords in 1873, the principal agreement was for a lease of cellars to be used as wine vaults. During the negotiations the lessor assured the lessee either that he had already taken, or that he would forthwith take, sufficient measures to keep the cellars dry and fit for a wine merchant's use. It seems most natural to regard this as a warranty: still, so far as it related to anything already done, it might be regarded as a positive statement of fact. "You will find the cellars dry," or any speech to that effect, might mean either: "I undertake to make the cellars dry," or "That has been done which is known by competent experience to be sufficient to ensure dryness." The line between warranty and estoppel is here a fine one, and perhaps not worth drawing, but still it is possible to draw it; and when Lord Cairns said "I quite agree that this representation is not a guarantee," he may have meant that he preferred to regard it as a statement of fact operative by way of estoppel. This point occurs only in Lord Cairns' judgment; the main question was whether the lessee's conduct amounted to acquiescence.⁶ There certainly does run through these cases, however, the idea that specific performance is so far a discretionary remedy that it may be refused to a party seeking it on grounds which do not affect his legal rights under the contract. But it seems a tenable position that equity judges have taken a needlessly narrow view of what is a binding agreement on the principles of the common law.⁷ In fact agreements collateral to leases, and not in writing, have of late years been enforced without doubt.⁸ In all these cases the facts appear indistinguishable in their character from those which were treated in the Court of Chancery as establishing a right to relief on the ground of "representation."

There remains a class of cases in equity in which it has been held that a statement made to a person intended to act upon it by one who knows it to be false, or is recklessly ignorant whether it is true or false, may create in the person who acts on it to his injury a substantive right to compensation. Here the statement is a wrong, and the remedy is precisely analogous to, and before the Judicature Acts was concurrent with, that which was given at law by the action of deceit, or action on the case in the nature of an action of deceit.⁹

It is worth remark that not unfrequently a difficulty occurs in drawing the line between contract or warranty and fraud, as we have already seen that there does between contract and estoppel. "Most of the cases . . . when looked at, if they do not absolutely amount to contract, come uncommonly near it. . . . If you choose to say, and say without inquiry, 'I warrant that,' that is a contract. If you say, 'I know it,' and if you say that in order to save the trouble of inquiring, that is a false representation—you are saying what is false to induce them to

⁵ L. R. 6 H. L. 414; 43 L. J. Ch. 203.

⁶ On this point Lord Atkinson's remarks in *Abram S.S. Co. v. Westville Shipping Co.* [1923] A. C. 773, 788; 93 L. J. P. C. 38.

⁷ It would be curious to know in what proportion of cases under the old practice a party left by the Court of Chancery, as the phrase was, to make what he could of it at law, derived substantial or any profit from that liberty.

⁸ *Morgan v. Griffith* (1871) L. R. 6 Ex. 70; 40 L. J. Ex. 46; *Erskine v. Adeane* (1873) L. R. 8 Ch. 756; 42 L. J. Ch. 895; *Angell v. Duke* (1875) L. R. 10 Q. B. 174; 44 L. J. Q. B. 78; *De Lassalle v. Guildford* [1901] 2 K. B. 215; 70 L. J. K. B. 533; C. A. (warranty of drains being in good order). The ground taken as to the Statute of Frauds is that the collateral agreement is not a "contract or sale of lands," &c.: the effect of the Statute being as it were exhausted by the principal contract; with which the collateral one must of course be consistent. [See, too, *Hawkesworth v. Turner* (1930) 46 T. L. R. 389; *Jameson v. Kinnell Bay Land Co., Ltd.* (1931) 47 T. L. R. 593.]

⁹ See for details the section on Deceit in Chap. viii of my work on the Law of Torts.

act upon it."¹⁰ Thus cases are possible, as has been mentioned in the test, in which the legal effect of the facts may equally be considered as warranty, estoppel, or duty *ex delicto*. And since equity judges, dealing with facts and law together, were not bound to distinguish with precision, and often did not distinguish, on which of two or more possible grounds they rested their decisions, it is not surprising that a good deal of ambiguity gathered round the subjects discussed in this note.

[The Lord Chancellor's Law Revision Committee, in their Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration), 1937, Cmd. 5449, pp. 24—25, after examining some of the authorities, recommended that "a promise which the promisor knows, or reasonably should know, will be relied on by the promisee, shall be enforceable if the promisee has altered his position to his detriment in reliance on the promise." They regarded *Jorden v. Money* as productive of considerable hardship.]

10—FRENCH LAW ON "INOFFICIOUS" GIFTS AND CAPTATION (P.490)

French jurisprudence has been cited in our Courts (not within the last half century, I think ; the last reference known to me is in *Lyon v. Home* (1868) L. R. 6 Eq. at 671) as affording useful analogies in cases where it was sought to set aside gifts on the ground of undue influence, especially spiritual influence. (*Euvres d'Aguesseau* 1. 284, 5. 514, ed. 1918 ; *Lyon v. Home*, L. R. 6 Eq. 671.) Without denying the instructiveness of the comparison, it may be pointed out that these French cases proceeded on rather different grounds. Charitable bequests in general were unfavourably looked on as being "inofficious" towards the natural successors, and the law deliberately protected the lawful heirs, as the text of the passages cited shows.

¹⁰ Lord Blackburn in *Brownlie v. Campbell* (1880) (Sc.) 5 App. Ca. at 952 : the whole passage should be studied.

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